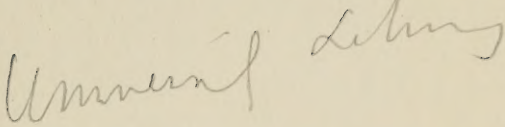

THE JUDICIARY AND THE PEOPLE

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CONTENTS

I

I

The Independence of the Judiciary and the Separation of the Powers of Government

The Grave Importance of Subject

The relation of the judiciary to the people in a self-governing country is a question of profound importance, not only to lawyers interested primarily in the administration of justice, but to all patriotic citizens who are concerned with the orderly administration of the powers of government and with the secure maintenance of private rights, whether of person or property. It goes without saying that a judge should be impartial, and independence of the parties to any controversy is an essential element in this impartiality. This grows out of the essential nature of any conception of the judicial office. We all recognize that the umpire in any game or contest of merit must

be impartial; that is, must be independent of the parties to the controversy which he must decide.

It is also important that the people of a self-governing country should have confidence in their judiciary; that is, in the system whereunder and the men by whom justice is administered. In this country where the courts in deciding private controversies may also determine grave constitutional questions, and in effect make law through the decision of concrete cases, it is the more essential that the people should have confidence in those in whose hands this great trust is imposed. The gravity of this subject is emphasized at the present time, when we have evidences on every hand of a distrust among our people of their judges, or of our judicial system. This has been proclaimed in the popular press, and even in the political platform of one of our great national parties, and has been voiced by the only living ex-Presidents of the Republic

though on different grounds and from radically different points of view. This is a subject of discussion in every meeting of our bar associations. In a recent meeting of the Massachusetts Bar Association, a paper was read by one of the most distinguished laymen of the country, the President Emeritus of Harvard University, on the Popular Dissatisfaction with the Administration of Justice in the United States.[1]

It is, therefore, indeed a timely subject to consider the relation of the judiciary to the people, and I therefore ask your attention to a historical review of the development of the judicial power in the United States, and thereafter to a consideration of the specific grounds of complaint and the suggested remedies.

Ancient and Medieval Conception of Judicial Office

The modern conception of the independence

[1] Green Bag, February, 1913.

of the judiciary is closely associated in all modern governments with what is known as the principle of the separation of the powers of government. This is comparatively a modern conception, having been first formulated by Montesquieu in France in his "Spirit of the Laws," published in 1748.

The ancient and medieval conception of the judicial office shows little or no trace of any recognition of this principle of a judgeship distinct from the other powers of government. Although the principle is said to have been recognized by Aristotle,[2] we can find no formal recognition of this maxim of government until comparatively modern times. In ancient societies, the King was at once a military chieftain, a priest and a judge. Such were the Homeric chieftains. We have an interesting representation of the ancient conception of the judicial office in the representation on the shield of Achilles, fashioned by Vulcan, as

[2] Aristotle Politics, Book 6, ch. XIV.

described by Homer,[3] whereon a trial scene was presented, and in this the Elders, in the presence of the people, are rising up and giving judgment in turn.

Two forms of authority are associated in the administration of justice in the early history of mankind, that is, the King and the Popular Assembly. As the royal authority disappeared in the highly developed civilizations of Greece and Rome, the popular assemblies gained power in the administration of justice; and with the illustrations from classic history of this administration of justice by the popular assemblies, we are familiar. This much is clear, that apart from the influence of popular assemblies, justice was administered by the political power of a ruler associated at times with the elders or the local chiefs, as in the representation of Homer. Thus, the Roman Prætor was a political officer vested with important functions in the govern-

[3] Iliad, 18, 508.

ment of the state, while acting as the supreme judicial officer in the control of the judicial machinery for the determination of causes.

The power of the popular assembly in the administration of justice was more fully developed among the ancient Germans, as described by Tacitus, and there we find that justice was administered by the chiefs selected for that purpose with the aid of the popular assemblies; and this is of special interest to us, as it is from these liberty-loving Germans that our Anglo-Saxon self-governing communities are lineally descended. Thus, Tacitus says of the Germans:[4]

"In the same assembly chiefs (principes) are chosen to administer justice through the districts and villages. Each chief in so doing has a hundred companions of the commons, assigned to him as at once his counsellors and his authority."

We have an interesting illustration of the

[4] Germania, ch. 13.
Freeman's Growth of English Constitution, ch. 1.

primitive administration of justice in the Old Testament narrative of the Mosaic Law; that is, when Moses, finding his position as the Chief Judge of all the people to involve too burdensome a duty, appointed, we are told, "able men, such as feared God, men of truth, hating covetousness, and placing them to be rulers of thousands, of hundreds, of fifties and of tens," and allowed them to judge the people at all seasons, that is, in small matters; but the hard cases, we are told, they brought unto Moses and he continued to judge them.[5]

In view of the tribal division of the people of Israel, it would seem that the local intra-tribal controversies were determined by the local chiefs or elders thus appointed, while the larger questions, those relating to the differences between the tribes, were reserved for the judgment of Moses as the Chief of the people. Thus, we find a trace of the necessary dependence of a federated state upon a central

[5] Exodus, ch. 18.

and controlling authority, of which we shall find illustrations in later history.

In the subsequent Hebrew history we find that Israel was judged by military chieftains and by Prophets. Thus, Samuel the Prophet judged Israel, and when he was old he made his sons judges over Israel;[6] and we are told that his sons walked not in his ways, but turned aside after lucre, and took bribes and perverted judgment: and that was the occasion of the establishment of a kingly power, and thereafter the supreme judicial authority was exercised by the Kings.

The Judiciary in English History

In England, the country from which we derive our jurisprudence, the King was the original source of justice, which was administered by the King and the Council, or Curia, and from this Curia was developed, in the course of time, not only the English Parlia-

[6] 1 Samuel 7: 15, and 8: 1-3.

ment, with its two Houses, of Lords and the Commons, but also the courts which have come down to modern times.

Modern historic investigation has shown that in medieval England, legislation in its proper sense, even after the organization of the two Houses of Parliament, was all unknown, and the Parliament has not improperly been termed the High Court of Parliament.[7]

Judicial Power of Parliament

So far from there being any recognition of the principle of the separation of the powers of government, there was in effect, even in the Parliament, a fusion of the legislative and the judicial functions. Parliament was called together, not only for the purpose of legislation or taxation, but so that the complaints of the people of the Commonwealth, or of indi-

[7] High Court of Parliament and its Supremacy, by McIlwain.

viduals, might be discussed and heard. It was the King's recognized High and Extraordinary Court of Justice, in which he would grant redresses whenever the ordinary tribunals were unable or unwilling to grant relief. The King was the fountain of justice, and the Parliament his advisers or assistants in judicature. The development of the modern theory of the sovereignty of parliament is the result of a historic development, which is traceable through the contest of the parliament with the Stuarts in the seventeenth century, and is characteristic of the unique political history of England, "a country of old and just renown, where freedom broadens slowly down, from precedent to precedent."

This development of the English Parliament from a body wherein judicial and legislative powers were thus fused, was considered by our supreme court,[8] and it was ruled that the claim of the House of Representatives

[8] Kilbourne v. Thompson, 103 U. S. 168.

in Congress of the right to punish a citizen for contempt of its authority could derive no support from the precedents and practices of the two houses of parliament in England, as this power in England went back to the time when parliament exercised the highest functions of a court and represented the King in his High Court of Parliament; and the court commented upon the fact that this judicial authority was still exercised by the House of Lords as an appellate court.

The Bills of Attainder, that is, acts of condemnation, which are expressly prohibited by the constitution of the United States and were frequent in England during the Tudors, were illustrative of this early fusion of powers.

It must not be overlooked, however, that during this period, though there was a fusion of judicial and legislative powers in parliament, the substantive common law which our courts are now exercising and enforcing both in England and in the United States, was being

gradually but surely developed, through legislative acts from time to time, as well as in the decisions of the courts; and this is the common law which is administered by the courts of England and its self-governing colonies, as well as in the United States. But this history is illustrative of what is now well recognized, that the separation of legislative and judicial functions in the powers of government is a refinement of the principle of political government and jurisprudence, which can only be the result of an advanced civilization.[9]

Montesquieu on Separation of Powers

The principle of the separation of the powers of government was first distinctly formulated, as already stated, by Montesquieu in his "Spirit of the Laws," published in 1748. Probably no pronouncement of the philosophy of government has created a more profound and lasting impression upon thoughtful men.

[9] May's Parliamentary Practices, 9th Ed., p. 754.

It certainly was so received, not only in this country, but on the continent of Europe, though, as will be seen, with a very different application, and it is here quoted:

"In every government there are three sorts of power: the legislative; the executive, in respect to things dependent on the law of nations; and the executive, in regard to matters that depend on the civil law. By virtue of the first the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security and provides against invasions. By the third, he punishes criminals or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the State. . . . . When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not sepa-

rated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined with the executive power, the judge might behave with violence and oppression. There would be end of everything were the same man, or the same body, whether of nobles or of the people, to exercise those three powers—that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[10]

Timeliness of Montesquieu's Declaration

This declaration of Montesquieu of the fundamental principle of the separation of the powers of government was published at a most opportune period in the history of the governments of the world. The American and French revolutions, which were destined in the generations immediately succeeding to make profound and lasting changes in the governmental organizations of both continents,

[10] Spirit of the Laws, Book XI, ch. 6 (Nugent's Translation).

may be said to have been then impending. In the American colonies and in France these fundamental principles of government were eagerly discussed. It was in England, however, where the revolution of 1688 had defeated the attempted absolutism of the Stuarts, that Montesquieu saw what he deemed was a practical illustration of his principle of the separation of the powers. By the Act of Settlement in 1701, the independence of the judiciary had been secured by the provision that judges should not be removed save on an address from Parliament to the crown. It had been the practice of the Stuarts, especially in the last years of their dynasty, to dismiss without seeking any other pretense, judges who showed any disposition to thwart the government in political prosecutions. Under the Act of Settlement, the commissions of the judges were *quam diu se bene gesserint;* that is, during life, or good behavior, instead of *durante placito,* at the discretion of the

crown, as they had been theretofore. Montesquieu had previously studied the English system as set forth in the laws, but he did not foresee the future development of the supremacy of the House of Commons and the subjection of the royal authority through disuse of the veto power, nor did he realize what has been termed the law-making power of the judiciary, through opinions in concrete cases under the doctrine of judicial precedent, nor did he realize or foresee the tremendous power of public opinion in modifying the written law.

The Anglo-Saxon and Continental Systems of Law Contrasted

Before proceeding with the consideration of the adoption and construction of this separation of the powers in our American constitutions, attention must be called to the fundamental distinction in the conception of law between the Anglo-Saxon, that is, both England and the United States on the one hand,

and that in France and the countries of continental Europe on the other. Thus in England and the United States, all men are equal before the law and there is one law of the land to which every one is subject, from the humblest citizen to the highest officer. In France and other continental countries, on the other hand, there is a very different conception of law, in that public officials thereunder are not interfered with by the courts, but are made subject to a different system known as Administrative Law, and applied by distinct tribunals—in other words, public law, as distinct from private law; and this distinction had existed under the old *régime* in France, as well as in other countries of continental Europe and was extended and systematized after the French revolution. That profound commentator, the late Professor Thayer,[11] says that the term "separation of powers," means in the mouth of the French statesmen

[11] Constitutional Cases, Vol. I, p. 6.

or lawyers something different from what we mean in English. And so as to the independence of judges, he says that Montesquieu misunderstood on this point the principles and practices of the English constitution, and his doctrine was in short either misunderstood or misapplied by the French statesmen of the French revolution, whose judiciary was biased at once by the knowledge and the influences which had resulted from the interference of the French parliament in matters of state, and by the characteristic of the traditional desire to increase the force of a central government.

Thus the doctrine of the separation of powers had a profound influence in France and continental countries and is directly connected with the legal position of public officials, rendering it essentially different from that in English countries.

President Lowell on Same

To quote from another eminent authority,

President Lowell, in his "Governments and Parties in Continental Europe":[12]

"The French statesmen, therefore, took Montesquieu's doctrine in the sense that the administrator ought to be free to act for the public weal without let or hindrance from the courts of law. . . . . The American and French applications of the doctrine of the separation of powers are both perfectly logical, but are based on different conceptions of the nature of law. The Anglo-Saxon draws no distinction between public and private law. To him all legal rights and duties of every kind form part of one universal system of positive law, and so far as the functions of public officials are not regulated by that law, they are purely matters of discretion. It follows that every legal question, whether it involves the power of a public officer or the construction of a private contract, comes before the ordinary courts. In France, on the other hand, private law, or the regulation of the rights and duties of individuals among themselves, is treated as only one branch of jurisprudence; while public law, which deals with the principles of government and the rela-

[12] Vol. I, pp. 54, 55 and 56.
See also Baldwin's American Judiciary, ch. 3.

tions of individuals to the State, is regarded as something of an entirely different kind."

This principle of the separation of the powers of government was emphatically stated in the constitution of the French revolution. Thus in the French Constitution of September 3, 1791, it was said "that system under which the guaranty of rights is not secured or the separation of powers is not fixed, is no constitution." And Articles I and III of this constitution also provide:

"The judicial power can not in any case be exercised by the legislative power or by the king. The tribunals can not interfere with the exercise of the legislative power, nor suspend the execution of the laws, nor encroach upon its functions, nor cite any administrator to appear before them on account of their functions."

Judge Dillon and Governor Baldwin on Same

Judge Dillon, in his addresses in this course many years since, commented upon this rule

of equal law—that is, the law which is applicable to public officials as well as to private citizens—as one of the chief excellences of our English system of law.[13] This distinction is also pointed out by Governor Baldwin,[14] who says that the system of administrative law prevailing on the Continent of Europe by which cases involving acts of public officials are withheld from the ordinary tribunals is totally unknown in this country, where any officer of the government, and even the President, after the expiration of his term, may be sued in a court having jurisdiction of the parties. The continental system of administrative law was really involved in the dispute between the Stuarts and parliament. That is, the question was whether a distinct administrative law administered through the King's tribunal, such as the Star Chamber, should or

[13] Laws and Jurisprudence of England and America, p. 115.

[14] American Judiciary, ch. 3.

should not be permanently established in England. The advocates of the prerogative wished to give the government the rights conferred upon a foreign executive under the principles of an administrative law, and these efforts finally culminated in the revolution of England against the claim of dispensing power by James II and in the Bill of Rights of 1688.[15]

Separation of Powers in American Constitution

Turning now to the formation of the Federal Constitution, we find that no opinion had more weight with its framers than this declaration of Montesquieu.[16] In the debates of the Constitutional Convention frequent reference was made to the separation of the powers, and

[15] Dicey's Law of the Constitution, 7th Ed., pp. 365, 366.

McIlwain's High Court of Parliament and its Supremacy, p. 319.

[16] Sir Henry Maine on Popular Government, p. 218.

although the constitution itself does not contain a distinct enunciation of the maxim, it does recognize the fact of separation by implication in the distinct statement of the executive, legislative and judicial powers.

In the debates in the different States preceding the adoption of the constitution, it was criticised on the ground that it had violated this fundamental principle of the separation of the powers, as in giving the executive a part through the veto power in legislation. But it was answered in the Federalist that this involved no substantial violation of the fundamental principle of the separation of the powers of government. The distinction was further declared, which was subsequently affirmed by Judge Story,[17] that the principle of the separation of powers does not mean that the three departments must be kept wholly and entirely distinct and have no link of connection or dependence the one upon the other

[17] See Story on the Constitution, 5th Ed., p. 393.

in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hand which possesses the whole powers of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.

The principle of the separation of powers was strongly impressed upon the people of the United States, even before the adoption of the constitution. Thus, it is said in the constitution of Massachusetts, adopted during the Revolutionary War in 1780,[18] that the legislative department "shall never exercise the judicial or executive powers, or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the legislative or executive powers, or either of them; to the end it may be a government of laws and not of men."

[18] Part I, Article 30.

Soon after the adoption of the Federal Constitution, in 1792, the Constitution of Kentucky said:[19]

"Each of them to be confided to a separate body of magistry; to-wit, those which are legislative to one, those which are executive to another, and those which are judicial to another. No person, or collection of persons, belonging to one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted."

This language is almost literally repeated in the Missouri Constitution of 1875. This principle of the separation of the powers is either expressly declared as above, or else is implied in the distribution of all such powers in separate articles, as in the United States Constitution—in the other states of the Union.

Federal Courts on Imposition of Non-Judicial Duties

The application of the separation of powers

[19] Article I.

under the constitution of the United States was first presented by an act passed by congress March 23, 1791, requiring the circuit courts to revise the claims of widows and orphans of soldiers and of those entitled to invalid pensions subject to a further revision thereafter by the secretary of war, and by congress. The judges of different circuit courts protested that neither the legislative nor the executive branches of the government could constitutionally assign to the judiciary any duties but such as were properly judicial, and were to be performed in a judicial manner, and that by the constitution the government is divided into three distinct and independent branches, and that it is the duty of each to abstain from and to oppose encroachments on either. Some of the judges declined to perform the duty imposed by the act. Before the matter could be definitely determined by the supreme court of the United States, congress relieved the embarrassment by repealing the

act in question and providing in another way for the relief of the pensioners.[20] This principle of the separation of the powers was thereafter distinctly declared by the supreme court. Thus it was said:[21]

It is believed to be one of the chief merits of the "American system of written constitutional law that all the powers entrusted to government, whether State or National, are divided into three great departments, the Executive, Legislative, and Judicial. That the functions appropriated to each body of public service, and that the perfection of the system required that the lines which separate these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with powers in any one of these branches should not be permitted to encroach upon the powers confined to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriated to its own department and to no other."

[20] Hayburn's Case, 2 Dallas 410.

[21] Kilbourne v. Thompson, 103 U. S. 168.

The Judicial Construction of the Separation of Powers

This judicial recognition of the principle of the separation of the powers of government does not mean, however, that the constitution of the United States makes this principle of separation of powers obligatory upon the states, or that it could be enforced by the federal government upon the states by the annulment of state legislation either prior to or since the adoption of the fourteenth amendment. The principle of the separation of powers is political rather than judicial; and though one of the most important, if not the most important, of our governmental principles, it is not guaranteed by the federal government to citizens of a state in a state, and it must rest for enforcement upon that public opinion which is the foundation of self-government.[22] However strongly the principle of

[22] Stimson on Law of the State and Federal Constitutions, p. 50.

separation may be stated in constitutions, in fact there is not, and cannot be, a complete separation or independence. This was set forth in the Federalist, in the discussion upon the adoption of the constitution, to which reference has been made. It is illustrated by the broad construction given by state courts to the provisions in state constitutions declaring the separation of powers. While the assumption by the legislature or executive of distinctly judicial powers has been condemned by the courts, it is also true that it is not always easy to distinguish between powers and duties which might and those which might not be assigned by the legislature to the other departments of the government. It is often difficult to point out the precise boundary separating legislative from judicial duties, and still more difficult to discriminate sometimes between what is properly legislative and what is properly executive.

The difficulty of enforcing the principle of

the separation of powers is greater in the state than in the federal government, on account of the fact that in the states the legislative power is not definitely limited as it is in congress. It is the principle of our American constitutional law that a state legislature has full power over all subjects of legislation, except where expressly limited by the constitution of the State or of the United States. This broad extent of legislative power may include matters pertaining to the other departments of government, as in the supply of funds for their support, in the determination of rules of practice and procedure in the courts, and the like. The only definite line of limitation which can be laid down is that the legislature cannot impair the essential powers of either the executive or the judicial department nor assume the performance of what are essentially executive or judicial duties.

It would not be practicable within the limits of this lecture to consider in detail the different

cases in which this principle has been involved. It is sufficient to say that the courts have been disposed to give a liberal construction to the legislative power where there was no essential impairment of executive authority or judicial independence,[23] and especially when it is not easily determined where the power may be properly lodged.[24]

Not Enforced by Supreme Court in Annulment of State Statutes

While the supreme court of the United States has in strong terms affirmed that the separation of powers is one of the chief merits of our system of constitutional law, it has declined uniformly to make this a ground of annulment of state statutes.

Thus, it was held in 1829[25] that there was nothing in the constitution of the United

[23] For full discussion of this subject see Bondi on the Separation of Governmental Powers.

[24] State *ex rel.* v. Tolle, 71 Mo. 645.

[25] See Satterlee v. Matthewson, 2d Peters 380.

States which forbade the legislature of the state to exercise judicial functions. It has also been ruled since the adoption of the fourteenth amendment that the guaranty of the due process of law does not interfere with the determination by a state, in allotting matters properly belonging to one department of the government to another. This principle has been applied in a variety of cases. Most important of all was that raised in connection with the so-called direct legislation, wherein the court decided that neither guaranty of a republican form of government nor the due process of law under the fourteenth amendment prevented a state from adopting the initiative and referendum, though it was strenuously urged that this system of direct legislation was not a republican representative government in the sense contemplated by the constitution.[26] The court based its conclusion upon the essential difference between

[26] U. S. Tel. & Tel. Co. v. Oregon, 223 U. S. 118.

political and judicial power, and, following the ruling in Luther v. Borden,[27] declared that this guaranty of a republican form of government is a duty resting upon congress to determine what government was the established one in a state; and the decision of the state could not be questioned in a federal judicial tribunal.[28]

It seems, therefore, that the question, not only of which of the two contending governments is the lawful government in a state, but also the question of whether the government established is republican in form within the meaning of the constitution of the United States, is for the legislative, and not for the judicial, department of the government to determine. It is clearly established that the distribution by a state of the different functions of government among the different

[27] 7th How., p. 1.

[28] See also Mississippi v. Johnson, 4 Wal. 475; State of Georgia v. Stanton, 6 Wal. p. 50.

departments, that is, the state's own determination of what modification is required of the principle of the separation of the governmental powers, is not reviewable under the constitution of the United States. It will be seen that this distinction between political and judicial power is one that is made on the continent of Europe to a far greater extent than it is in the United States.

Non-Judicial Duties in State Courts

In the practical working of this principle of the separation of the powers of government, we must not overlook the fact that the example set by the first congress in imposing upon the judiciary non-judicial duties has been followed not infrequently in different states. Sometimes this has assumed the form of imposing upon the judiciary administrative duties, such as the making of apportionments of territory for election purposes, and also of making appointments for what are consid-

ered non-political offices, such as boards of equalization or taxation review and the like. Sometimes these duties have been performed and sometimes they have been declined. This disposition, however, as in the acts of congress on the pension lists, does not indicate a want of confidence in the judiciary, nor a disposition to impair its independence; but, on the contrary, indicates a distinct confidence in the fairness of the judges and a disposition to make use of their presumed impartiality in rendering a non-partisan service. The tendency, however, is to be deprecated as imposing an improper burden on the judiciary and one inconsistent with the independent character of the office.

Exercise of Judicial Powers by Legislative Bodies

On the other hand, we have had instances in this country of the exercise of what are essentially judicial powers by legislative bodies.

Thus, in some of the states, judicial powers were vested in the state senates as appellate courts after the fashion of the House of Lords of the English Parliament. This plan was adopted in New York, New Jersey and other states, but the arrangement may be said to have been definitely abandoned as unsatisfactory both to the bar and to the public.[29]

Thus bills of attainder, which were expressly forbidden by the federal constitution and by nearly all of the state constitutions, but which were frequent in England under the Tudors and Stuarts, were an illustration of the exercise of the judicial power by legislation. The power of impeachment vested by the constitution in congress, and by similar provisions of the constitutions of several states in their legislatures, are illustrations of what is deemed the proper exercise of the judicial power by a legislative body. In the

[29] See Sharswood in Note to Blackstone, Bk. III, p. 56.

early history of the country, legislative divorces were known in some states; but now by the constitutions of many states they are directly forbidden.

Another illustration of the exercise of judicial and quasi-judicial functions by legislative bodies is in the determination of contests for seats in the legislative bodies. In this country such contests are, as a rule, determined by the body itself, which is made judge of the qualifications of its own members. A different rule prevails in England, where such matters are determined judicially by the courts of law.

The Appellate Jurisdiction of House of Lords

The most notable instance of the exercise of a judicial power by a legislative body is in the appellate jurisdiction that is exercised by the English House of Lords. This, however, is really an illustration of the tremendous force of custom, or what Mr. Dicey terms one of

the "conventions" of the English law. There are some six hundred members of the English House of Lords, and nominally each member has a right, whether learned in the law or not, to participate in all the sittings of that body. The exercise of this appellate jurisdiction is made practically possible through the voluntary abstention of all but the law lords, especially appointed for that purpose, from the hearing and decision of causes on appeal. President Lowell[30] says:

"The unwritten rule that only law Lords shall sit when the house meets for judicial business is one of the conventions of the Constitution that is most strictly observed, and if it were not rigidly followed, the position of the House as a court of law would be discredited. It is a striking example of the force of custom in England that the reputation, the condition and continued existence of the high-

[30] Government of England, Vol. 2, p. 465.

For a discussion in the House of Lords as to this duty of lay members to refrain from voting on a decision of an appeal case, see O'Connell v. the Queen, 1844, 11th Cl. & F. 421, *et seq.*

est tribunal should depend upon the unbroken maintenance of a condition which any one of the six hundred members has the power to break."

Modern Administrative Commissions

The modern exigencies of government, however, have compelled the exercise of administrative powers in England and the United States, as well as on the continent of Europe, which were unknown in Montesquieu's time. Thus, the regulation of public utilities by railroad commissions and other public commissions, has necessitated the delegation of what would be classed as legislative and also as executive powers to administrative boards. The constitutionality of these delegations of power has been uniformly sustained in the courts of the states and of the United States.[31]

[31] See Express Co. v. Railroad Co., 111 N. C. 463; Burlington, etc., R. R. Co. v. Dey, 82 Iowa 312; Chicago, etc., R. R. Co. v. Jones, 149 Ill. 361; Georgia, etc., R. R. Co. v. Smith, 70 Ga. 694; also Railroad Commission Cases, 116 U. S. 307.

Sometimes these commissions have been vested with what may be termed judicial powers, or quasi-judicial powers.

It has been held, however, by the supreme court,[32] that it is not the name of the body, that is, whether it is a legislature, or a commission, or a court, which determines whether the proceedings are legislative or judicial in character. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or supposed facts, and on laws supposed already to exist. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. This is the fundamental distinction as declared by the supreme court between legislative and judicial proceedings.

The Interstate Commerce Commission

The Interstate Commerce Commission, with

[32] Va. Corporation Commission case, 211 U. S. 210.

its powers enlarged by statutes as well as by judicial construction, is a unique illustration of an administrative board vested with the different powers of government. As an administrative board, it enforces the executive power of investigation and prosecution; as a quasi-judicial board, it exercises the judicial function of determining the reasonableness of existing rates and of suspending a proposed increase of rates pending investigation; and also of finding undue discriminations and preferences entitling the claimant to reparation, and its findings and award of damages are given *prima facie* weight in any judicial proceeding to enforce the same. It also exercises what has been repeatedly adjudged to be the essentially legislative power in fixing rates for the future.

Modern Criticism of Montesquieu's Maxim

This modern creation of a department of administration, recognized and necessitated by

the complexity of the functions of modern government, has been commented on by some jurists as indicating that the classification of Montesquieu is lacking in both scientific and practical foundation. Attention has been directed to the impossibility of enforcing this principle as a constitutional guaranty, and it has been said that the true classification of governmental powers is into the subdivisions of "political" on the one hand and "administrative" on the other, the term "administrative" to include all the manifestations of executive action with the administration of judicial affairs through the courts.[33]

On the other hand, the classification of Montesquieu has been criticised on the distinctly practical ground that it is inconsistent with the modern view of business efficiency, which calls for the concentration and not the

[33] Prof. Frank J. Goodnow in Politics and Administration (p. 18) and Comparative Administrative Law. See also Gneist, Preface to English Constitutional History.

division of responsibility.[34] This criticism, however, is not directed against the independence of the judicial power, but deals solely with the question of the separation of the legislative and executive departments of the government. Thus it has been said that the commission form of government for cities, which combines legislative and executive departments, does not impair popular government, but does locate definite responsibility, and thus tends to prevent the abuses of municipal government.

Conceded Independence of Judicial Power

It is apart from our subject, however, to discuss this question of the separation of the powers, except in relation to the independence of the judicial power. Whatever may be the difference of opinion as to the maintenance of this theory of the separation of the powers

[34] See Address of Walker D. Hines before Bar Association of the State of Kansas, January 27, 1913.

between the executive and the legislative under modern conditions, and particularly in the government of our modern cities, it is still recognized that the maxim formulated by Montesquieu has been of vast importance in emphasizing the independence of the judiciary, and to this extent it has been thoroughly established in the constitutional system of this country as a great fundamental principle of free government. Its true meaning is that the whole power of one of the departments should not be exercised by the same hand which possesses the whole power of either of the other departments. The science of government is a practical one and the incidental exercise of powers of one department by the other can not impair this governing principle.[35]

This principle of constitutional government has had a radically different interpretation in France and other continental countries from

[35] See Bondi on Separation of Governmental Powers.

that adopted in Anglo-Saxon countries, and we shall see that it has been reconciled with the written constitution construed and enforced by the judicial power of the United States, and with the unwritten and so-called flexible constitution and a sovereign parliament in England. Notwithstanding this different construction and application of the fundamental maxim formulated by Montesquieu, the great central principle of the independence of the judicial power remains unquestioned as the cornerstone of constitutional government in the United States.

I

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CONTENTS

II

II

The Relation of the Judicial to the Legislative Power

In the last lecture were considered the maxim of the separation of the powers of government as formulated by Montesquieu, its constitutional and statutory recognition in England, the United States and on the continent of Europe, and its necessary qualification in the complexity of modern government. We are now brought to the discussion of the relation of the power of the judiciary to the other departments of government.

The Power of Judiciary as to Executive Acts

No question is now made in England or the United States, and I may add in any English-speaking country, as to the right of the judiciary to determine the validity of acts of the executive branch of the government. This

was the issue between the Stuarts and Parliament in the seventeenth century. The revolution of 1688 and the Bill of Rights repudiated the claim of the power of dispensation, that is, of suspending by royal edict the operation of statute law, which had been asserted by James II, and established for all time among English-speaking people the subjection of the executive power to the rules of law declared by the people in their legislation, as construed by their courts.

The Continental View

This principle, however, is very materially qualified in the system of administrative law which prevails in France and other continental countries, to which attention has already been called. Under this so-called administrative law, the government and every servant of the government possess, says Mr. Dicey,[1] as representatives of the nation, a whole body of

[1] Law of the Constitution, p. 186.

special rights, privileges and prerogatives as against private citizens, and the extent of these rights, privileges and prerogatives has to be determined or ascertained before the law and considerations, which fix the legal rights and duties of one citizen towards another. These questions are determined by administrative courts, at the head of which stands the Council of State. These so-called courts have in comparatively recent times acquired to a certain extent a quasi-judicial character and have adopted a quasi-judicial procedure.[2]

We have observed in the last lecture that this continental view of government officials is really based upon their construction of the maxim of separation between judicial and administrative powers. The principle is there asserted that administrative bodies must never be troubled in their functions by any act whatever of the judicial power, a position which is radically inconsistent with the principle recog-

[2] Dicey's Law of the Constitution, p. 191.

nized as fundamental law in England and the United States, that of equality of all men before the law. This distinctive application of the maxim of the separation of the powers has also a direct relation to the Continental view of the relation of the judiciary to the legislative power, to which attention will be called hereafter.

Natural Law in the Courts of England and the United States

Turning now to the revolution of 1688 in England, whereby legislative and judicial independence of executive power were secured, we find that this was followed by the recognition, as a fundamental principle of the English law, of the sovereignty of parliament. Prior to the revolution of 1688 the doctrine had been declared in England that the courts were competent to decide upon the rightfulness or wrongfulness and to ascertain the validity or invalidity of statutes upon principles of natural

justice, when it was necessary to defend the royal prerogative against the encroachments of parliamentary power. Thus Coke said:[3]

"And it appears in our books that in many cases the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against the common right or reason and repugnant or impossible to be performed, the common law will control it and adjudge such act to be void."

This principle of judicial control over legislation was extensively discussed both in England and in the American Colonies in the seventeenth and eighteenth centuries, and was no doubt profoundly impressed upon the founders of our government. It has from time to time found utterance in judicial opinions in this country, and notably in the words of Justice Miller, in the case of Topeka v. Loan Association, holding invalid bonds issued

[3] Bonham's case, 4th Rep., Part VIII, p. 234. See also Coxe's Judicial Power and Unconstitutional Legislation, p. 174.

by the city in aid of a private manufacturing company.[4] Thus it was said:

"The theory of our Government, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights without which the social compact could not exist, and which are respected to all governments, entitled to the name."

"No court, for instance, would hesitate to declare void a statute which enacted that A and B, who are husband and wife to each other, should be so no longer; that A should thereafter be the husband of C, and B the wife of D, or which should enact that the homestead owned by A should no longer be his, but henceforth be the property of D."

Judge Cooley, in his Constitutional Limitations,[5] says:

"There was never a written, published Con-

[4] 20 Wallace, p. 655.
[5] P. 37, 2nd Ed.

stitution which delegated to functionaries all the latent powers which lie dormant in every nation, which are boundless in extent and are incapable of definition."[6]

It is true, as declared by these authorities, that our fundamental rights, in which are included that of holding and alienating private property, do not owe their origin to our written contitutions, though they are guarded and protected by them. They measure the authority of the rulers, but they do not measure the rights of the governed.

This opinion in the Loan Association case, though rendered after the Fourteenth Amendment, was not based upon the guaranties of individual rights therein contained. We shall see in the discussion of this amendment that its construction has really rendered academic this invocation of natural law; as both of the instances cited by Justice Miller of violations of domestic and property rights would be

[6] See also Kent's Commentaries, Vol. 2, p. 318, etc.

annulled under the "due process of law" guaranteed by both federal and state constitutions.

In England, on the other hand, this natural justice theory of Coke has been displaced in the administration of justice by the recognition of the Sovereignty of Parliament.

It is apart from the purpose of these lectures to consider the different conceptions of law in the English and American courts on the one hand, and that of the continental jurists on the other. The English and American conception of law is a body of rules enforced by the courts and is therefore distinguished from the so-called natural law which is discussed by the jurists of Germany and other continental countries and which is suggested in the opinion of Lord Coke and the others cited. This conception of law in England and the United States includes not only the statutes enacted by the legislature and construed and enforced by the courts, but also the rules declared by the courts in concrete cases, and

therefore followed by the courts under the law of judicial precedent; in other words, what has been termed, "judge-made law."[7] The law enforced by the Courts of England and the United States, which we have to consider, is that which is defined by Mr. Holland as a general rule of external human action enforced by a sovereign political authority.[8]

The Sovereignty of English Parliament

After the English revolution of 1688, the principle of the sovereignty of Parliament, which was voiced by Blackstone, became thoroughly established. Thus in his 10th Rule for construing statutes,[9] he says:

"If the Parliament would positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of

[7] Lowell's Government of England, Vol. II, ch. 61 and 62.

[8] Holland's Elements of Jurisprudence, 2d Ed., p. 34.

[9] I Blackstone, p. 91.

the constitution which is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of the statute is unreasonable, the judges are at liberty to reject it; if they were to set the judicial power above that of the legislature, it would be subversive of all government."

He illustrates this by saying that:

"If Parliament gave power to a man to try all cases arising in his manor, the act would not be construed to extend to a case therein arising wherein he is himself a party. But if the Parliament should indicate that he should try his own case as well as those of other people, there is no court that has power to defeat the intent of the legislature, when couched in such express terms as to leave no doubt of the intent."

He says that nothing but a revolution could destroy this power, and he concludes:

"So long, therefore, as the English Constitution lasts, we will venture to affirm that the power of Parliament is absolute and without control."

Constitutional Law in England and United States

The sovereignty of the English Parliament was really the historical outgrowth of a legislative body in a country without a written constitution. The term "Constitutional Law," which is so familiar in this country, is in the English courts unknown in the sense in which we use the term. The Constitution of England has been termed by Mr. Bryce,[10] and this term has also been adopted by Mr. Dicey,[11] a "flexible Constitution." That is, every part of it can be expunged, remodeled, amended or abolished with equal ease; and on the other hand, there does not exist in any part of the British Empire any person or body of persons, executive, legislative or judicial, which can pronounce void any enactment passed by the British parliament on the ground of such

[10] Studies in History and Jurisprudence, pp. 128, 130.

[11] Dicey's Law of the Constitution, p. 84.

enactment being opposed to the constitution, or on any ground whatever, except, of course, its being repealed by parliament. The constitution of England, therefore, as that of ancient Rome, was developed historically, through a series of acts which in their totality may be called the Constitution, but each of which is alterable by legislative authority like other laws.

Rigid and Flexible Constitutions

On the other hand, the same authorities term the constitution of the United States, and other countries having written constitutions, as "rigid constitutions." And they condemn the classification of "written" constitutions and "unwritten" constitutions as inadequate.

It necessarily follows, then, that with a flexible constitution and a sovereign parliament there can be no constitutional law administered by the courts as we understand the term. We have this underlying distinction

between the two countries, that in England there is no formal or rigid written constitution, while in the United States there is. This distinction, therefore, lies at the basis of our inquiry as to the origin of our system of constitutional law, wherein the courts freely exercise the power of declaring void acts of the legislative authority on the ground that they are inconsistent with the fundamental law declared in the written Constitution.

Mr. Bryce, in his "American Commonwealth,"[12] tells the story of an intelligent Englishman who had heard that the supreme federal court was created to protect the constitution and had authority given it to annul all laws, who spent two days in reading up and down the federal constitution for the provisions he had been told to admire. And Mr. Bryce adds that no wonder he did not find it, for there is not a word in the constitution on the subject.

[12] Vol. I, p. 246.

The Judicial Power in the United States Constitution

While there is no express power given to the courts on this subject, there are clauses in the constitution of the United States which it seems clearly point to and imply the existence of such a power, and were inserted for the purpose of directing the scope and manner of its exercise. We have first the jurisdiction clause, Section 2 of Article III, extending the judicial power to "all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority," and so on. . . . . And "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

And still more pointedly in what has been termed the Treaty Clause in Article VI:

"This constitution and the laws of the

United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Hamilton's Construction of Judicial Power in United States Constitution

It is true the power of the judiciary to declare legislation void is not declared in the constitution in express terms, and neither was it expressly declared in any of the State constitutions made prior to this time. In the discussions preceding the adoption of the constitution, however, the existence of this power was directly asserted as necessarily implied in a written constitution. This was the view of the Federalist.[13] Thus in the 78th

[13] See 1 Federalist, 47 and 48, Madison; 51, Hamilton and Madison; 60, 70, 73, 77, 78, 80 and 81, Hamilton.

Federalist (Hamilton), it was said that there was no position that depends on clearer principles than that every act of a delegated authority contrary to the declaration of the law under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal, that the servant is greater than his master. And he combats in the strongest terms the contention that the members of a legislative body were themselves the constitutional judges of their power.

Jefferson and Madison on Same

It is interesting to note in this history of the adoption of the constitution the correspondence between Mr. Jefferson, who was then in France, and Mr. Madison, with reference to the necessity of a Bill of Rights in the constitution, which should guard liberty

against the legislative as well as against the executive branch of the government. Mr. Jefferson was opposed to the constitution on the ground of the absence of such a Bill of Rights, and he advanced as an argument of great weight the legal check which it puts in the hands of the judiciary. Mr. Madison favored the adoption of a Federal Bill of Rights, though he was disposed to doubt its efficiency in a popular government; and he wrote to Mr. Jefferson these memorable words:

"Wherever the real power in the government lies, there is danger of oppression. In our government, the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended not from acts of the government contrary to the sense of the constituents, but from acts in which the government is a mere instrument of the major number of constituents. This is a truth of great importance, but yet not sufficiently attended to, and is probably more strongly impressed on my mind by facts, and

suggestions by them, than on yours, which has contemplated the abuses of power issuing from a very different quarter. Where there is an interest and a power to do wrong, wrong will generally be done, and not the less readily by a powerful and interested party, than by a powerful and interested prince."

He suggests, however, that a Bill of Rights in a popular government might serve the purpose of declaring political truths in a solemn manner, so that they might acquire by degrees the fundamental maxims of a free government.

Mr. Hamilton, on the contrary, in the No. 84 Federalist, and the same opinion was held by Mr. Wilson, urges not only the entire futility, but even the possible danger in a Bill of Rights, in that an imperfect enumeration might imply powers not so enumerated, and that the Constitution was itself a Bill of Rights. But Mr. Jefferson's view prevailed. The people refused to allow any form of undefined power over their liberties and property, and it was found impossible to secure the

ratification of the constitution by the several States except in connection with a recommendation of amendments in the nature of a Bill of Rights to be thereafter submitted by congress for ratification. Accordingly, out of a larger number, over one hundred, which were submitted by the several states to the first congress, the first ten amendments to the constitution were submitted to the States in 1789 and thereafter duly ratified. This declaration of rights thus originating in the federal constitution and followed by several declarations in succeeding state constitutions, and finally supplemented in 1866 by the Fourteenth Amendment, which throws the protection of the federal power over individual rights against invasion by state authority, were all expressly designed to be what their English precedents had never been, and in the nature of the English system could not be, constitutional restraints upon the legislative power.

Chief Justice Marshall in Marbury versus Madison

We have seen that in the Federalist advocating the adoption of the constitution, the principle was declared that under a written constitution the judicial power must necessarily extend to declaring void a legislative act in conflict with the constitution, and that no legislative act contrary to the constitution could be valid.

This was the view adopted by Chief Justice Marshall in his opinion in the case of Marbury v. Madison.[14] The Court cited no precedents, but held it was the duty of the court to consider the constitution as the supreme law, and it was therefore adjudged that the section of the Judiciary Act organizing the judicial system of the United States was void, because it undertook to vest original jurisdiction in the Supreme Court in mandamus, which was in conflict with the provision of the constitution

[14] 1 Cranch 137 (1803).

fixing the jurisdiction of the Court. Kent says as to this decision,[15] "that the reasoning approaches the precision and certainty of a mathematical demonstration," and that the question may be regarded as finally settled, and he considered it as one of the most interesting opinions in favor of constitutional liberty and of security to property in this country that has ever been judicially determined.

The State Rights Opposition

Notwithstanding this great authority, this extent of the judicial power was not accepted without question. Especially did it meet with criticism and opposition when it was exercised by Chief Justice Marshall and his associates under the appellate jurisdiction over the highest courts of the State under the judiciary Act of 1789, in annulling state legislation as violative of the Federal Constitution. The

[15] I Kent's Commentaries, 453.

jealousy of the judicial power was thus complicated with the State Rights opposition to any enlargement of the federal power. It was in connection with this controversy that Mr. Jefferson declared, in 1823, "In truth, there is at this time more hostility to the federal judiciary than to any other organ of the government."

Justice Gibson on the Judicial Power

In 1825 Justice Gibson, the eminent jurist on the Supreme Bench of Pennsylvania,[16] in a dissenting opinion, denied the abstract right of the judiciary to declare void an act of the legislature. He drew a distinction between acts that were repugnant to the constitution of the state and acts that were repugnant to the constitution of the United States, holding that the judiciary were bound to execute the former, but not the latter. He bases this distinction upon the difference between political

[16] Eakin v. Kane, 12 S. & R. 330.

powers and purely judicial powers. There was no grant of power by the state constitution to the judiciary to declare void acts of the legislature. On the other hand, in regard to acts of the state assembly which were in conflict with the constitution and laws of the United States, the situation was exactly the reverse, as it was expressly provided in the sixth article and the second section of the constitution of the United States that the constitution should be the supreme law of the land, and the judges in every state should be bound thereby. This he said was an express grant of political power which applied to the state as well as the federal judiciary. But this distinction was not followed. The rule declared in Marbury v. Madison was adopted in the states, in some of them expressly declared in the constitutions, and the power has been continuously exercised by the state courts with reference to state legislation and by the federal courts in relation to

both state and federal legislation since that time.

It is interesting to note that Justice Gibson abandoned his own contention. When this opinion was cited to him some twenty years afterwards, in 1845, he remarked to counsel:

"I have changed that opinion for two reasons. The late convention for reframing the Pennsylvania Constitution of 1838, by their silence, sanctioned the proceedings of the courts to deal freely with the acts of the legislature, and from my own experience of the necessity of the case."[17]

The Supremacy of Judicial Power in a Federal Government

Although Justice Gibson abandoned his own contention in the substantially universal acquiescence in the rule declared in Marbury v. Madison, it is none the less true that the distinction pointed out by him, based upon the nature of the federal government, deserves thoughtful consideration. The government of

[17] Norris v. Klymer, 2 Pa. St. 281.

the United States was not only novel in having a formal written constitution, but it was also novel in the governments of the modern world, in that it was a complex Federal State, including the distinct paramount authority and sovereign power of the federal government, with a sovereign power in the federated States. In so far as the relations of the federal government to the states were concerned, Justice Gibson construed the constitution as giving an express grant of political power, applicable to the State as well as to the federal judiciary, in determining whether state legislation was violative of the supreme federal law. Mr. Dicey in his Law of the Constitution has pointed out[18] that a federal compact requires a written constitution, and that without it, misunderstandings and disagreements would be generated. The distribution and limitation of powers is an essential feature of Federalism, and this division of powers distinguishes

[18] Lecture No. 4, The Law of the Constitution.

a federal from a unitarian system of government. He finds, therefore, that there must be some authority in a federal state of guarding against legislation inconsistent with the constitution, and he says it is the glory of the founders of the United States, that they have devised an arrangement whereby the constitution is made in reality, as well as in name, the supreme law of the land, and that they have attained this end by adherence to a very obvious principle, and by the invention of an appropriate machinery for carrying this principle into effect.

Illustrated by Other Federal Systems

Since our constitution was adopted in 1789, which is termed by Mr. Bryce[19] as the first true federal state founded on a complete and scientific basis, several federal states have been founded with constitutions more or less modeled after that of the United States. Thus

[19] Studies in History and Jurisprudence, p. 392.

we have the constitution of the Swiss Federation, enacted in 1848 and amended in 1874; the constitution of Canada established by the British North American Act of 1867; the constitution of the North German Federation in 1866, enlarged into that of the German Empire in 1871; and still later the organization by the Act of the British Parliament in comparatively recent times of the constitution for Australia; and still later in South Africa. The Federated States in Central and South America may also be mentioned. A large part of the world is now organized into federal governments. All of these have encountered the necessity of providing some authority for determining the relations of the constituent parts of such countries to the federal government. In Canada, the Dominion government is empowered to disallow Provincial acts which are illegal or unconstitutional, and we are informed by Mr. Dicey[20] that courts with

[20] See Law of the Constitution, p. 155.

an appeal to the Judicial Committee of the Privy Council inevitably became in Canada, as in the United States, the interpreters of the constitution. In Australia also the judicial power is relied upon for the determination of constitutional controversies, with appeal under certain conditions to the Judicial Committee of the Privy Council of England.[21] On the other hand, in the federated governments on the continent of Europe, that is, in Switzerland and the German Empire, while it seems that the same necessity for an authority to assert the supremacy of the federal law has been recognized, these states are not under the influence of the English law or traditions, and there a different view is taken of the judicial power, and courts as a rule cannot pass upon the constitutionality of laws. The supremacy of the federal authority is therefore sustained in these continental countries

[21] See Bryce's Studies in History and Jurisprudence, pp. 427-428.

by the political and not the judicial authority. It is important to observe, however, that wherever English law or English traditions prevail, as in the federated self-governing colonies of England, the tendency is towards the adoption of the American principle of determining by judicial authority the question necessarily involved in the enforcement of the written constitution of a federal state.

The Judicial Committee of the Privy Council

This necessity of some authority in a federated government for adjudging and enforcing the supremacy of the central government is singularly illustrated in the Irish Home Rule Bill which is now pending in the English parliament, having passed the House of Commons, and may become the law, notwithstanding the opposition of the House of Lords. It is an essential feature of this scheme that the acts of the Irish Parliament should be in harmony with the supreme authority of the English

parliament; and it is provided in the act that this supremacy of the English Parliament should be secured by referring such acts whose validity may be questioned to the Judicial Committee of the Privy Council, the modern survivor of the ancient Curia, wherefrom the Houses of Parliament and the Courts of Law are both descended. This Judicial Committee of the Privy Council is composed in part of the law lords who administer the appellate jurisdiction of the House of Lords under the peculiar constitution of that body. It will be seen that this jurisdiction of the Judicial Committee of the Privy Council, under the operation of this Home Rule Bill, is essentially the same as that exercised by the supreme court of the United States in determining whether acts of the states are valid under the constitution of the United States.

Eminent English authorities have commented upon the effectiveness of the system whereunder our Supreme Court maintains the

integrity of our federal system. In the words of Mr. Dicey,[22] "This system which makes the judges guardians of the constitution provides the only adequate safeguard which has hitherto been invented, against unconstitutional legislation."

It may yet come to pass that this Judicial Committee of the Privy Council may become the Supreme Court of the British Empire, and England may thus follow our example in providing a judicial tribunal for determining all constitutional controversies.[23]

[22] See Law of the Constitution, p. 129.

[23] The law officers of England have introduced a bill which is now pending before Parliament, entitled, "The Appellate Jurisdiction Bill," whereunder two new judges are to be appointed to be members of the highest court of appeal, both for the United Kingdom and the dominions and colonies, and this court is to sit exclusively in the House of Lords to hear appeals arising in the United Kingdom and in the Privy Council in respect to appeals from the colonies and dominions. It is said that this measure will be pressed forward and thereby an attempt made to strengthen the House of Lords and the Privy Council, the work of which is increasing beyond the capacity of those tribunals as at present constituted.

The Judicial Power Considered Irrespective of the Federal System

The arguments of the Federalist and the opinion in Marbury v. Madison, however, were not based upon any considerations relating to the needs of the federal government, but rested upon the broad principle that a written constitution was necessarily supreme and that the judiciary were bound to refuse to enforce a law in conflict with such constitution. This was the view adopted in all of the States, which without exception have followed the rule declared in Marbury v. Madison.

As we have seen, this principle of constitutional law is peculiar to the United States, and necessarily is unknown in England, as it is inapplicable to a sovereign Parliament under a flexible constitution. Notwithstanding the long acquiescence in the exercise of this power in the United States, it has in modern times been brought into general as well as

professional discussion.[24] It has been claimed that the arguments of the Federalist and of Chief Justice Marshall in Marbury v. Madison, based upon the essential nature of a written constitution, were inadequate, as written constitutions had been adopted on the continent of Europe, and there the existence of such a power was not recognized. It is asserted by that profound jurist, the late Professor Thayer,[25] in discussing the origin and scope of this American principle of constitutional law:

Professor Thayer on Same

"So as the grounds of this remarkable power is found in the mere fact of the constitution being in writing, or the judges being sworn to support it, they are quite inadequate. Neither the written form, nor the oath of the judges necessarily involves the right of reversing, displacing or disregarding any action of the legislature, or the executive, which those depart-

[24] See Address of Hon. Walter Clark before Law Department of the University of Pennsylvania.

[25] Legal Essays, p. 2.

ments are constitutionally authorized to take, or the determination of those departments that they are so authorized. It is enough, in confirmation of this, to refer to the fact that other countries, as France, Germany and Switzerland, have written constitutions, and that such a power is not recognized there."

The Continental System Compared

The fundamental distinction between the power of the judiciary under the English and the continental law has already been pointed out. The legislature on the continent is held to be the judge of its own powers under the constitution. The principle of the separation of the powers of government has been very differently applied in the continental countries from our own. The constitution, though written, is not the paramount law controlling the judiciary in the American sense. Thus it has been ruled in the Courts of Germany that the constitutional provision that well-acquired rights must not be injured, is to be understood only as a rule for the legislative power

itself to interpret. In other words, the text is addressed to the legislature, and not to the judiciary.[26] As heretofore shown, on the continent of Europe, the courts have not as a rule the power to decide upon the legality or illegality of administrative acts or of executive officials. This radical difference between the power of the courts in the common law and civil law countries has been explained by the fact that from historical reasons the common law judiciary is strong, while in the civil law countries the judiciary is feeble, and therefore different results have followed as to the constitutional acts and duties of the judicial power.[27]

The Term "Unconstitutional" as Understood under Different Systems of Law

This distinction between the English, the United States and the continental countries is

[26] Coxe on Judicial Power and Unconstitutional Legislation, p. 101.

[27] Same, p. 103.

thus interestingly illustrated by Mr. Dicey,[28] in the different meanings in those countries of the term "Unconstitutional" as applied to a law, varying according to the nature of the Constitution with reference to which it is used:

1. The expression as applied to an English act of Parliament means simply that the act in question is, in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the act is either a breach of law or void.

2. The expression as applied to an act of the French Parliament, means that the law, as one extending the length of the President's tenure of office, is opposed to the articles of the constitution. The expression does not necessarily mean that the law in question is void, for it is by no means certain that any French court will refuse to enforce a law because it is unconstitutional. The term would probably, though not of necessity, be, when employed by a Frenchman, a term of censure.

3. The expression as applied to an act of congress means that the act is one beyond the

[28] See Law of the Constitution, p. 167.

power of congress, and is therefore void. The word does not in this case necessarily import any censure whatever. An American might, without any inconsistency, say that the act of congress was a good law; that is, a law calculated in his opinion to benefit the country, but that unfortunately it was unconstitutional. That is to say, *ultra vires* and void. (The same might be said of a law of a state.)

Historical Origin of American System

Though we may concede that we must find the origin of this judicial authority in the United States elsewhere than in the essential nature of the written constitution, it is very clear that we will find ample reason for the existence of this authority in the political history and experience of the American people before the war of independence.[29] We were colonists, governed under written charters of government proceeding from the English crown. These charters were so many written

[29] Thayer's Legal Essays, p. 3.

constitutions, and enforced or annulled by judicial decisions and an ultimate appeal to the Privy Council. When the revolution came and we were no longer bound to Great Britain, our written constitution took the place of the sovereign authority theretofore existing. Time will not permit detailed reference to the several cases in the colonial courts involving the existence of this power. Reference, however, may be made to the case of Winthrop v. Letchmer, which was appealed from the Superior Court of Connecticut to the King and Council, and decided in the reign of George I in 1727.[30] In this case it was adjudged by the Privy Council that the statute of the colony abolishing the common law rights of primogeniture was void, because contrary to the laws of England.[31]

[30] Colonial Records of Connecticut, Vol. 7, p. 571.

[31] Coxe on Judicial Power and Unconstitutional Legislation, p. 208.

Debate in the Constitutional Convention of 1789 on a Revising Judiciary

In the federal convention of 1787 there was an interesting discussion of the proposition that the supreme national judiciary should be associated with the executive in a revisory power over the legislative.[32] The proposition was discussed on several different occasions, but was finally voted down, although Connecticut voted in its favor. It was supported, among others, by Mr. Madison, but it was opposed on the ground that the judiciary ought not to interfere in determining the policy of legislation. In the discussion on June 4, 1787, Mr. Gerry said that he doubted whether the judiciary ought to form a part of the Council of Revision, as they would have a sufficient check in their department by their exposition of the laws, which involved the power of deciding on their constitutionality. He said

[32] Farrand's Records of Federal Convention, Vol. 2, pp. 73, 77 and 80.

that in some States judges had actually set aside laws as being against the Constitution; and that this was done with general approbation. It was quite foreign from the nature of their offices to make them judges of the policy of public measures. Mr. Wilson thought perhaps it should be amended so as to give the executive and judiciary jointly an absolute negative on legislation. But it was finally voted by eight to two to give this revisionary control to the executive, without the judiciary, unless overruled by two-thirds of each branch of the legislature, and on this Connecticut voted no. And on the final adoption of the proposition, the joinder of the judiciary was again voted down by three ayes to eight noes, Connecticut, New York and Virginia all voting aye.

The discussion of this proposition shows clearly that the proposition was defeated because it was deemed unwise, and foreign to the judicial office, to join the judiciary in this

revision of legislation, when the same judiciary would be called upon to construe and determine the validity of such legislation.

Source of the American Conception of Judicial Power

We might rightfully conclude, therefore, that this American doctrine as to the judicial power and its relation to the legislative as well as the executive power, was a necessary outgrowth of the historic antecedents of the American people. They were familiar with the application of the same principle in the judgments of the Privy Council in determining the validity of their colonial legislation. The doctrine of legislative sovereignty was then comparatively modern in English history, and our American colonists had a profound and deep-seated conviction, intensified by the incidents of their colonial government, that all the powers of government should be distinctly restrained and held in check in order that

individual liberty might be protected. Thus, under the circumstances of the American colonists, with the inheritance of the struggle of their ancestors for freedom in England, the doctrine of the separation of the powers of government and the independence of the judiciary led directly to the conviction that written constitutions, interpreted and enforced by an independent judiciary, were essential to free government.[33]

[33] The general subject of this lecture has been extensively discussed in recent years. Among these publications may be mentioned J. Brinton Coxe on Judicial Power and Unconstitutional Legislation, Kay & Bro., Phila., 1893; Gov. Baldwin's American Judiciary, Century Co., 1905; Prof. James B. Thayer's Legal Essays, Boston Book Co., 1908; Chas. Austin Beard on Supreme Court and the Constitution, the Macmillan Co., 1912; J. Hampton Dougherty on the Power of Federal Judiciary over Legislation, 1912; Prof. A. D. McLaughlin on the Courts, the Constitution and Parties, University of Chicago Press, 1912. Address of Chief Justice Walter Clark, of North Carolina, before the Law Department of the University of Pennsylvania, printed in Congressional Record, August 4, 1911.

II

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Page	*Foot Note*	*Citations*
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CONTENTS

III

III

The Judiciary in the United States

In the preceding lecture we have considered the separation of the powers of government as formulated by Montesquieu, and the relations of the power of the judiciary to the executive and legislative departments in the United States, and also as developed in England and on the continent of Europe. We have seen that in England the historic development of a sovereign Parliament has resulted in a radically different relation of the judiciary to the legislative power from that developed in the United States, in that the judiciary has no power to annul the acts of Parliament, because the sovereignty of Parliament, with an unwritten constitution, precludes the enforcement of unconstitutionality as it is understood in this country. On the other hand, on the continent of Europe, we have found that

the principle of the separation of powers has had an entirely different consideration and development from that prevailing in the United States or in England, and the judiciary as a rule have no power to determine the constitutionality of legislative acts, even where written constitutions exist.

We have now to consider the historic development of the judicial power in the United States. It may be said in general terms, without detailing the constitutions of the several states, which have grown from the original thirteen to forty-eight, that the principle of the separation of the powers of government and of the independence of the judiciary, has been declared in all of them in language more or less specific. It is also true that in all of them the principle declared by Chief Justice Marshall in Marbury v. Madison, that the constitution is necessarily controlling, when the legislature enacts a law in conflict therewith, and that it is the right and duty of the judi-

ciary to declare such conflict when a case is judicially presented for determination, is the established and all but unquestioned law.

Justice Harlan on the Judicial Power in United States

This principle thus declared in the United States as fundamental in constitutional law as to the power of the judiciary, and sharply distinguished from the sovereignty of the English Parliament on the one hand and the subordinate position of the judiciary in continental countries, is nowhere more clearly announced than by the late Justice Harlan, and his long experience and well-known independence of character gave great weight to his words. Thus, he said on the retirement of his colleague, Mr. Justice Brown:[1]

"We all take pride in the American judicial system. It is the mainstay of our civilization. As so organized, it is unique among the systems established for the safety of the people

[1] 40th American Law Review, p. 553.

and for the security of personal rights and individual freedom. It is unique because, in this land, the judgments of our courts can not, as in some countries, be reviewed or set aside by other departments of the government. . . . With us, the legislative department is not paramount, except within the limits of the authority granted to it. The great doctrine of the separate, independent exercise of judicial authority, as distinguished from legislative and executive authority, is essentially American in origin, for, while the thought was suggested by a European publicist shortly prior to the Revolution, it was not distinctly formulated or embodied in any governmental document until that was done in this country in 1776."

To the same effect was the unanimous opinion of the supreme court delivered by the same justice, declaring the statute of a state to be void as violative of the federal constitution,[2] wherein it was said:

"This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is

[2] Smyth v. Ames, 169 U. S. 528.

enjoyed under them depend in no small degree upon the power of the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The Judicial Power Only Exercised in the Decision of Cases

This judicial power, however, can only be exercised whether in the federal or state courts, when a case between parties is regularly presented to the court for determination. This is a distinctive principle of American constitutional law.

In England the Crown was originally in fact, as it still is in theory, the foundation of justice, and therefore the Council of the King could rightfully call for the opinion of the judges appointed by the Crown on any matter pending before the Council. In early English history the judges were summoned to attend the House of Lords as other members; but later they were not summoned to attend as members, but were expected to give advice

when required. The House of Lords may still call upon the judges for an opinion, but it has been declared by the judges that they would decline to answer a question if it was not confined to the strict legal construction of existing laws.[3]

The question was early presented to the judges of the Supreme Court. In 1795 Washington, upon the advice of his cabinet, asked

[3] *In re* London & Westminster Bank, 2 Cl. & F. 191. This was in relation to an act of incorporation pending before Parliament. "The House of Lords has power in all cases to call on the judges to attend and assist them in their deliberations by giving their opinion on any point of law which may arise in any exercise of the judicial functions of the House. This is frequently done in the case of peerage claims. The House, however, need not agree with the advice of the judges." Halsbury Laws of England, Vol. 9, p. 23. See also same, Vol. 21, pp. 647-8.

There is an interesting discussion of the same subject in the opinion of the Judicial Committee of the Privy Council in Atty. Gen. v. Atty. Gen., 106 L. T. 916, holding that a statute of the Dominion Parliament of Canada authorizing the questioning of the judges of the Supreme Court was not *ultra vires*. See also 47 Am. Law Review, 286.

the judges of the Supreme Court for an opinion as to the proper construction of the clauses of the treaty with France. The judges declined to give an opinion, holding that it would not be proper for the court to give an opinion upon any question not brought before the court in regular form in some particular suit. There are provisions in the constitutions of several of the states authorizing the governor or legislature to call upon the supreme court of the state for an opinion as to pending legislation; but the courts seem to have uniformly held that such opinions are not controlling as precedents, when cases are thereafter presented to them between contending litigants involving the same question. Where there is no constitutional authority, it has been held that the judges are not bound to answer such questions.[4]

[4] Thus, in 33 Conn. 586, the judges of the Supreme Court declined to give an opinion to the General Assembly concerning certain proposed legislation, there being no constitutional provision authorizing

This judicial power, as recognized in the United States, must therefore remain dormant and legislative acts must be obeyed; and anyone, even a public official, refuses obedience at his peril, until someone's individual case is brought before the court for judgment and decided. It was one of the charges of impeachment against President Andrew Johnson that he had refused obedience to certain acts of congress, alleging the same to be unconstitutional; but the charge was not sustained by the necessary two-thirds vote required for conviction.

This is the distinguishing feature of our judicial system which has attracted the attention of foreign observers. It has been well said that the whole system of Anglo-Saxon civil liberty has really been built up upon prin-

the same. It seems that the same judges had given opinions to the General Assembly on previous occasions of special importance, but they declined to consider such action as a precedent controlling their action.

ciples settled in controversies where the interests and liberty of single individuals were alone involved, as in the case of John Hampden and the Ship Money, or of Wilkes and the Freedom of the Press.

The court, therefore, only decides questions of constitutional law when such questions are raised in a case calling for decision. It is only, therefore, as litigation may spring up and may raise the point of constitutionality that any question for the court can arise.[5] Sir Henry Maine[6] says that this largely accounts for the success of the Supreme Court of the United States in the determination of constitutional questions. The process is slower, but it is freer, he says, from suspicion of pressure, and much less provocative of jealousy than the submission of broad and emergent political propositions to a divergent political body. This latter form of submission is

[5] Thayer's Constitutional Cases, Vol. 1, p. 152.

[6] Popular Government, p. 223.

what a European foreigner thinks of when he contemplates a court of justice deciding an alleged violation of an alleged constitutional rule or principle. It will be seen that under this principle, a court can only decide a constitutional question when it decides a case, that grave constitutional questions may be the subject of controversy for years before they are adjudicated; and such was the case of the United States Bank, and also the matter of the power of congress in legislating concerning slavery in the territories of the United States. The Missouri Compromise was not declared unconstitutional until some thirty-seven years after its enactment.

The Federal and State Constitutions Distinguished

In the last lecture it was shown that the theory of the natural reservations upon legislative power growing out of the nature of

free government has given place in England to a sovereign parliament under an unwritten or flexible constitution, and in this country to a system of fixed or written constitutions, construed and enforced by the judicial power, in determining the conformity of legislation to such fundamental law.

It is unnecessary, therefore, further to consider opinions referring to what are termed implied reservations between legislative power growing out of the nature of free government, but it is sufficient to state the doctrine of American constitutional law in its commonly accepted terms: That from the very nature of our complex federal government the courts look into the federal constitution for grants of legislative power to congress, and into both the federal and state constitutions for limitations upon the power of the state legislatures, and that the exercise of the legislative power of them within the scope of constitutional grants or limitations will not be ques-

tioned by the courts upon considerations of natural justice or policy.

Upon such questions, the determination of the legislative power within its constitutional limitations is conclusive. The distinction thus stated between the federal and state constitutions is obvious when the underlying principles of our federal organization are considered. The federal constitution, though ordained and established by the people of the United States, distinctly declared that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, were reserved to the states respectively, or to the people. It is also true that, while the government of the United States is one of the enumerated powers, there is also a national sovereignty, or national federal state, within the scope of the enumerated powers, and the constitution and laws of the United States are the supreme law of the land. The complexity of our governmental system recog-

nizes this distinctly sovereign power in the federal government with the sovereign powers in the states. In the language of Chief Justice Marshall:[7]

"In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the rights committed to it, and neither sovereign with respect to the rights committed to the other."

It necessarily follows that the federal government, being one of enumerated powers, and the legislative power being limited as declared in the constitution, the legislative acts of congress must be justified by the express enumerations of the constitution, or by necessary implication therefrom, including, as declared by the Supreme Court, among these powers of legislation those necessarily involved in the national sovereignty created by the constitution, within the scope of the enu-

[7] McCullough v. Maryland, 4 Wheaton 316.

merated powers.[8] With the enumerated powers must also be included what has been termed the coefficient power to make all laws necessary and proper to carry into effect the enumerated powers.

On the other hand, the state legislatures have all the sovereignty not delegated to the government of the United States, and therefore we look into the State constitutions, not for the grant of legislative power when the validity of such legislation is considered, but for limitations thereon, and these must be specifically declared in the constitutions of the several states. We, therefore, look into the federal constitution for the *grant* of powers to the congress, and into the state constitutions for *limitations* upon the power of a state, when the legislative acts of congress or the state legislatures are called in question under their respective constitutions.

[8] Juilliard v. Greenman, 110 U. S. 421.

The Federal Bill of Rights

Reference has already been made to what may be called the federal Bill of Rights, the first ten amendments to the federal constitution, which were proposed by Congress and ratified by the legislatures of the several States pursuant to the Fifth Article of the Constitution. This was the Bill of Rights intended to protect the citizen against the power of the new government thus created, and which Mr. Jefferson thought should be included in the constitution, and the adoption of which was really necessary to secure the assent of the states to the ratification of the constitution. These amendments all contain limitations upon the powers of congress, and include, among other things, religious liberty, the right to bear arms, protection against the quartering of soldiers, the unreasonable searches and seizures, the guarantee against the deprivation of life, liberty or property without due process of law, against the taking

of private property for public use without just compensation, and for a speedy trial in criminal prosecutions, and the like.

These amendments have been invoked in comparatively few cases, as the power of Congress over the life, liberty and property of the citizen is limited by the comparatively narrow scope of the federal power, and it is only in comparatively recent years that the extent of the federal power in the regulation of interstate commerce or in the control of the mails has been realized.

The Judiciary Act of 1789

It is not within the scope of this lecture to detail the organization of the Federal courts, nor to comment upon the course of decisions therein, further than to illustrate our general topic of the relation of the American judiciary to the people. It is sufficient to say in this connection that congress organized the supreme court immediately upon the adoption

of the constitution and has since, from time to time, organized inferior courts. By what is known as the Judiciary Act of 1789, enacted at the first session of congress under the constitution, the courts, as first established, were organized and the supreme court was empowered in certain cases to review the decisions of the highest courts of the States.

By this act, which has been in force since that time, the supreme court may re-examine, reverse or affirm the final judgment and decree of the highest court of a state in which a decision can be had, where there is drawn in question the validity of a treaty or statute and there was an authority exercised under the authority of the United States and the decision of the highest court of the state is against that validity; where there is drawn in question the validity of a statute of, or authority exercised in any state, on the ground of that being repugnant to the constitution, treaties or laws of the United States, and the decision

of the state court is in favor of the validity of such state statute or authority; or where there is drawn in question the construction of any clause of the constitution of the United States; or of a treaty of or statute of, or a commission held under the United States, and the decision of the state court is against the title, right, privilege or exemption, specially set up or claimed by the other party thereunder.[9]

The Right of Review of State Decisions

This provision limiting the right of review by the supreme court to cases where the federal claim was denied, was based upon the assumption that the party complaining did not need to invoke the federal authority if the decision of the state court was in favor of his claim of the federal right. In the last lecture attention was called to the fact that

[9] 709 R. S., 7 Am. Stat. 468.

the exercise of this authority thus limited met with intense opposition when the supreme court of the United States rendered its first decisions reversing the supreme courts of the states. These were the decisions which were bitterly assailed and criticised by Mr. Jefferson and others who believed that this assertion of the Federal authority involved the subjection of the states. It is an interesting illustration of the changed conditions of public opinion, that now there is a demand, not only from a great political party, but also from the American Bar Association, that this right of review should be extended to cases where the federal right is sustained as well as where it is denied by the state court; and this is favored, not only because it is deemed that it is best that we should have a uniformity of ruling on claims of Federal right, but also on the further ground, to which reference will be made hereafter, that the supreme court of the United States is deemed

to take a broader view of the legislative power on so-called social questions than some of the state courts.

The Fourteenth Amendment

The judicial framework thus established at the adoption of the constitution remained substantially unchanged for some eighty years, until after the Civil War, when, for the avowed purpose of protecting the recently enfranchised freedmen in the southern states in the rights of American citizenship, the Fourteenth Amendment was adopted, succeeding the thirteenth amendment, which had abolished slavery. This fourteenth amendment not only declared that all persons born or naturalized in the United States and subject to the jurisdiction thereof, should be citizens of the United States and of the states wherein they resided, thus effectually annulling the rule declared in the Dred Scott case, but in addition thereto declared that no State should

make or enforce any law which would abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. This amendment was adopted through the ratification by the States, and proclaimed as ratified on July 2, 1868.

Construction of the Fourteenth Amendment

This amendment has had an interesting judicial history. When the first important case under this amendment came before the Supreme Court in 1872,[10] it was held that the privileges and immunities protected by the fourteenth amendment are such only as arise out of the nature and character of the Federal government, and that no fundamental change had been effected in the relations of the state

[10] Slaughter House Case, 16 Wallace 36.

and federal Governments. In this case it was said:

"We doubt very much whether any action by the state not directed by way of discrimination against the negroes as a class or on account of their race, will ever be held to come within the purview of this provision."

It was also held in the early construction of the amendment, that it afforded no protection to individual invasion of individual rights, and that congress had no power under the amendment to make positive and affirmative laws for its enforcement.[11] Some years later it was ruled by the court that corporations were persons within the meaning of the provision of the amendment that forbade any state to deny to any person within its jurisdiction the equal protection of the laws, and also of the due process of law.[12]

[11] United States v. Cruikshank, 92 U. S. 542.

[12] Santa Clara Co. v. Southern Pac. R. R. Co., 118 U. S. 394; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Minneapolis & St. Louis R. R. Co. v. Beckwith, 129 U. S. 26.

These later decisions were rendered nearly twenty years after the adoption of the amendment, and since that time the vast importance of the amendment under this judicial construction has been realized. The negro, for whose immediate benefit the amendment was enacted, has practically disappeared from litigation under the amendment, while the cases wherein corporations and other parties have claimed to be deprived of property under due process of law, have crowded the docket of the court. It was then realized that a tremendous change had been made by this amendment in the extension of the jurisdiction of the supreme court, and that the guaranty of due process of law and the equal protection of the laws now protected the citizen, corporate as well as individual, against any exercise of state authority. While it operated upon the state, and not upon individual action, it extended to the validity of any act of the State legislature and to all the instrumentalities by

which the state acted, so that whoever by public position under the state government deprived another of any right protected by that amendment, violated the constitutional inhibition.[13]

It seems that despite the early prediction of the court, a fundamental change was made in the relation of the federal government to the states in that now the federal authority was directly extended to the protection of the fundamental rights of person and property within the states against the exercise of any of the powers of the state through any of the instrumentalities of the state. This was a profound change, the importance of which is being realized more and more.

Justice Miller on the Fourteenth Amendment

In an interesting opinion of the supreme court, delivered some nine years after its

[13] Raymond v. Chicago Traction Co., 207 U. S. 35.

passage, Justice Miller,[14] who had been disposed at first to give a limited construction to the amendment, commented upon the practical working of the fifth and fourteenth amendments to the federal constitution, in that the former, a prohibition upon the federal government against depriving a citizen of life, liberty or property without due process of law, had been rarely invoked or discussed during its existence of nearly a century, while the latter, only adopted some nine years before as a restraint upon the powers of the states, had already crowded the docket of the court with cases in which it was asked to decide that citizens had been deprived by their own states of life, liberty or property without due process of law.

It was suggested in the opinion that the increase in this class of litigation might be owing to a misconception of what constituted due process of law; but the court declined in

[14] Davidson v. New Orleans, 96 U. S. 103.

this case, as it has done in the very many cases decided since that time, to define due process of law or the equal protection of the laws. In the nature of things the terms are not definable, and their application to a concrete case as it is presented must be determined by the judicial process of inclusion and exclusion.

The explanation of the contrast pointed out in the opinion referred to seems to lie in the fact, that it is the comprehensive and all pervading police power of the state and not the limited power of the federal government which comes in contact with the fundamental rights of life, liberty or property secured by these amendments; and it is against the invasion of these rights under the police power of the state that the protection of these constitutional guaranties must necessarily be invoked. The effect of the adoption of this amendment, therefore, was to give the citizen, whether individual or corporate, the protection

of the federal government as well as that of his own state against any exercise of authority by the state which is violative of these fundamental rights of life, liberty or property.

Changed Conditions Affecting Exercise of Police Power of States

More than a human generation has passed since this decision, and the social and economic changes in that time have forced into public and judicial discussion as never before the relation of the fundamental rights of the individual to the police power of the state. The stress of competition in business has led to a struggle to avoid the evil of excessive competition through business association, and public hostility has been aroused by the attempted elimination of competition through monopoly. Furthermore, the world-wide discontent with the distribution of wealth has caused a distinct drift in the direction of state socialism among the masses; and this has been promoted by the

growth of humanitarianism and the struggle for social betterment. When to all this we add the superstition that legislation is a sovereign cure-all for social ills, and last, but not least, the agitation of reckless politicians with the unthinking vote, we have potent factors in inducing legislation, which has forced and is forcing upon the attention of the profession and upon the courts a new class of constitutional questions, and these are the weighty questions of our time in jurisprudence as well as in social economics.

The legislation enacted under these influences, particularly when aimed at abridging individual liberty of contract, in the relations of employer and employee, not infrequently involves grave questions of constitutional law, both as to due process of law and the equal protection of the laws, and under the construction of the fourteenth amendment the validity of state legislation enforced by these influences is subject to the final determination

of the federal authority by the supreme court of the United States.

The Effect of the Fourteenth Amendment on Federal Courts

Reference is made to the enormous increase of litigation under the fourteenth amendment and its effect in crowding the docket of the supreme court. This has been increased at an enormous rate since the change was remarked by Justice Miller. It seems from a compilation in a recent work[15] that from the time of the adoption of the fourteenth amendment to the close of its term in 1912, the supreme court had handed down six hundred and four opinions under the fourteenth amendment, and of these applications for federal interference by way of restraining or annulling state action only fifty-five were decided adversely to the state; that is, some

[15] Carroll on the Fourteenth Amendment and the States, ch. VII.

nine per cent. This would indicate that the court has been conservative in its action and liberal in its view of the state legislative power in this class of legislation. It should be remembered that these cases have come before the supreme court from two different sources, one by writ of error to the decisions of the highest court of the State, this remedy being only available where the decision of the State court is adverse to the Federal claim, and also in direct review of the action of the inferior federal courts. It is said in this same compilation that the intervention, as it is termed, of the federal court, in the cases where the state action was declared void, involved the annulment in whole or in part of thirty-two statutes, nine city ordinances, and a portion of four state constitutions. I quote further from the same authority:

"As to the total number of the fifty-five instances of interference, eleven were made under the equal protection clause of the Amendment, six of these involving the right

of negroes to sit on juries; fourteen were made under the equal protection and the due process of law clause considered together. The remaining thirty were made under the due process of law alone; twenty deprivation of liberty without due process of law and twenty-eight as taking property without due process of law."[16]

A very large per cent, over half, were cases wherein corporations were complaining of the exercise of state authority. It will be seen that this enormous mass of litigation has been imposed upon the supreme court in addition to the volume of litigation arising under the federal statutes, including the very large amount of litigation arising under the commerce clause. The growth of our interstate commerce, with the incidental conflict between federal and state authority, has itself presented numerous questions under the power of congress to regulate commerce which have involved the validity of State legislation.

[16] Carroll on the Fourteenth Amendment and the States, p. 106.

The effect of all this has been to increase the burden upon the supreme court of the United States; and necessarily to delay the decisions of causes. Notwithstanding the establishment of the circuit courts of appeals some twenty years since for the express purpose of relieving the supreme court and the placing in those nine courts of appeal the final determination of litigation based solely upon the difference of citizenship, the docket of the supreme court is still crowded, and the congestion is said to be growing worse year by year.

The Twilight Zone

The litigation under the Fourteenth Amendment has presented an anomaly, which is of course due to our complex form of government, with its system of dual sovereignties. In the exercise of this power to regulate commerce or in the exercise of any exclusive federal power, the federal authority, when

exercised, is exclusive. That is to say, any inconsistent state action must give way when the federal authority is exercised. This is not the case with the exercise of the annulling power of the federal government through the supreme court, when it is invoked against any state action as violative of due process of law and as denying the equal protection of the laws. In such a case the federal government must stop with its annulling of the state action. It cannot go on and affirmatively direct what action the state should or can take. This has created what has been termed the "Twilight Zone," in that in such contingency the party invoking federal protection can escape any regulation, as the state authority is paralyzed.[17]

This broad statement, however, must be qualified by the fact that where the State authority is annulled because of the excess of its interference with property rights, the annul-

[17] Carroll on Fourteenth Amendment and the States, ch. 10.

ment by the federal authority only goes to that excessive exercise of the state authority and has no effect upon the exercise of the state authority of regulation within lawful bounds. This would apply to the regulation of rates of railroads and the like, when the state regulation is condemned as confiscatory in the denial of the just rights of property. Neither would there be any "twilight zone" where only a specific form of state regulation or interference is condemned, as the complaining party would still be subject to all lawful forms of state regulation.

There is, however, a legitimate basis for comment and complaint in the inevitable delays involved in the suspension of the exercise of the state authority pending the prosecution of a case involving the validity of the same to the supreme court of the United States for final determination. This may require several years, and meantime the state authority is paralyzed, though of course the complaining

party in such a case prosecutes such litigation at his own peril.

The Federal and Recent State Constitutions Contrasted

This situation has been further complicated by another growing tendency, a tendency induced by the desire to restrain and limit the legislative power in the states. Thus, the constitution of the United States states only the broad outlines of governmental power, without attempting to enumerate in detail or to specify each and every one.[18] It has proven fortunate, indeed, in the marvelous expansion of the country that the framers of the constitution stated the federal power in language so broad and comprehensive that it is clearly applicable to the complex conditions and agencies of present commerce, as it was to the simple conditions and agencies when the commerce clause of the constitution was adopted.

[18] McCullough v. Maryland, 4 Wheaton 316.

This great principle of constitutional law is happily illustrative of the simple and comprehensive phrases, and also in the history of the commerce clause. In the graphic language of Justice Brewer:[19]

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the methods of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water or canal by the sailing vessel. Yet in its actual operation it touches and regulates transportation by means then unknown, the railroad and steamship. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it operates with equal force upon any new modes of such commerce which the future may develop."

Very different has been the course of constitution making, particularly during the last

[19] *In re* Debs. 158 U. S. 564.

fifty years, in the several states. The earlier state constitutions were modeled after that of the United States, including those of the original states which preceded the federal constitution, and contain, as a rule, only the general outlines of governmental organization. Thus, the constitution of Massachusetts, after setting forth the Bill of Rights and the frame of government, contains no directions or instructions or limitations upon the legislature, save that they shall enact "all manner of wholesome and reasonable laws as they may judge for the benefit and welfare of the state."

The later American constitutions, however, are framed on a very different principle, and that is, they are filled with restrictions upon the law-making power. Some of the most recent have become veritable codes of laws. Thus, the Missouri constitution of 1820, including all amendments up to 1865, contained but three express restrictions upon the powers of the General Assembly to pass laws,

one relating to banks, another to slavery, and a third prohibiting legislative divorces. The constitution of 1875, now in force, contains fifty-six sections, more than half of which either prohibit the enactment of laws upon designated subjects, or for designated purposes, or prescribe in detail the manner of enacting, amending or repealing laws already in force. Other constitutions enacted in the last fifty years contain substantially the same features.[20] Not only has special legislation been

[20] Henry Hitchcock on American State Constitutions, 1887.

Mr. Stimson, in his Federal and State Constitutions, p. 69, speaks of that "extraordinary development of the modern State constitution which tends to reduce all law making to constitutional provisions; to require a periodical referendum; and to a great extent to do away with representative government. New constitutions, such as those of Alabama, Louisiana and the seven western States, evidently seek to embody all the broad notions of what a present majority thinks the law ought to be into the organic law of the State. Necessarily this leads to the embodying of he prejudice and caprice of the moment into the constitution itself; for it is human nature to care more for one's peculiar fancies than for commonplace facts."

forbidden, and doubtless wisely where the subject can be covered by general legislation, but the discretion of the general assembly is so effectively limited that constitutional litigation is involved in nearly all the so-called progressive legislation which is enacted in the states. Thus, the forms of indictment are prescribed in some constitutions, and this has led to technical decisions which have been the subject of deserved criticism.

Effect of Excessive Legislation in Constitution

Some of these constitutional restraints are doubtless occasioned by the growth of special interests and the multiplication of social needs with increasing population and wealth; but it is none the less true that this excessive restraint upon the legislative power and the loss of distinction between the permanent law of the constitution and the enactment of legislation is to be deplored, not only because it

multiplies constitutional questions for litigation, but it also aggravates the tendency, which all candid men must admit results from our rigid written constitutions, both State and Federal, in that they not only make public opinion slower, but they tend to intensify the professional conservation of lawyers and make them and our judges strict constructionists. Thus, they are prone through the operation of this tendency to ignore the substance in searching out technical arguments and objections. All of this aggravates what has been justly termed the excessive contentious spirit in our litigation and obscures the administration of justice. The remedy lies in the omission of such detailed legislation in our constitutions, and of course in making them at the same time readily amendable, that is, with provision for due and proper consideration of amendments. They should be modeled after the constitution of the United States in stating the outlines of the governmental organization

and with the broad guaranties of the Bill of Rights, though they must, of course, contain proper protection against the abuse of the legislative power, which is undoubtedly greater in the state legislatures than in the comparatively limited range of the federal power.

The Deterioration of Legislation

This over-legislation in state constitutions has been coincident with, and, in a measure, doubtless, the result of, an enormous increase in the volume of state legislation. Some States have sought to limit this by having only biennial sessions; but, none the less, the volume of legislation produced at these sessions exceeds some fourteen thousand different enactments, covering in print some twenty to twenty-five thousand pages. Professor Reinsch[21] says that the political and social service which in our own system required this flood of enactment,

[21] American Legislatures and Legislative Methods, p. 300.

was, in the principal European states, performed by a few hundred statutes. This volume of legislation is to some extent made up of private and local legislation, which is enacted sometimes in the guise of general legislation to evade the constitutional prohibition of special legislation, but no doubt the general legislation is largely owing to the causes, social and economic, to which reference has been made.

This enormous volume of legislation has been marked by a progressive deterioration in the character of the legislation. Until a comparatively recent period there has been no attempt to provide for the careful scientific preparation of bills in our legislative bodies, such as has long been in use in the English parliament. Constitutional provisions, requiring that bills should be considered on different days and read at length before final passage, are frequently evaded through the co-operation of the members and the clerk

under "unanimous consent" so that the record which imports verity is made to show a compliance on its face with the constitutional requirement, when in fact, there is no such compliance.

All this is mentioned because it has a direct relation to the position of the judiciary in relation to legislation. There has been a growing disposition to disregard the question of constitutionality in legislation on the ground that such matters can be "straightened out" by the courts. On this question of the changed position of the courts in consequence of these legislative tendencies, I quote from Professor Reinsch:[22]

."The attitude of the courts toward legislation has changed very much in the course of our national existence. During the earlier decades of the nineteenth century the constitutionality of statutes was rarely disallowed, and then only on very strong grounds and by an undivided court. A liberal benefit of doubt

[22] Same, p. 314.

was always given to the validity of the law. But since the universal degeneration of the legislative product the courts have become more critical and have begun freely to use their power of enforcing the constitutional law in opposition to statutes. A statement such as was made by the Supreme Court of Pennsylvania in 1886, would have been thought absolutely unwarranted in the earlier years.[23]

"The court said, 'It is our purpose to adhere rigidly to the constitution, that the people may not be deprived of its benefits. It ought to be unnecessary for the court to make this declaration, but it is proper to do so in view of the amount of legislation which is periodically placed upon the statute book in entire disregard of the fundamental rule.' "

Anomaly of Unreviewable State Construction of the Federal Constitution

Comment has been made on the anomalous situation developed by the frequency of the appeal for federal interference against state

[23] Morrison v. Bachert, 112 Pa. State 322.

See also Hensel, The Decadence of the Legislative Branch of our State Government, Pennsylvania Bar Association, 1898, p. 105.

legislation and the limitation of the right of review of state decisions by the supreme court of the United States in cases where the decision of the state court is against the federal claim. The effect of this limitation is to make the decision of the State courts final where they decide against the State legislature in favor of the federal claim as violative of the due process of law and the equal protection of the laws. There have been several notable decisions of this class, where state courts have rendered decisions that acts of the state legislature are void as denying due process of law or the equal protection of the laws, and such decisions have been final, as they would be, of course, as to the application of the State constitution and also as to the Federal constitution, because the Federal claim is sustained and not denied. Thus, in the state of Missouri, two amendments to the state constitution have in recent years been adjudged violative of the equal protection of the laws

guaranteed by the federal constitution;[24] and in such cases the decisions were solely on the ground of the federal claim and were final because the federal claim was sustained.

This anomaly, however, when analyzed, applies also to the federal court enforcing its construction of the state guaranty of due process of law or equal protection of the laws. These anomalies really grow out of the complexity of our system of government whereunder these fundamental guaranties of individual right are secured both by the federal and state constitutions. The demand for the extension of this right of review of the supreme court to all cases where the federal claim is asserted in the state court really comes from those who have complained of what they deem a narrow construction by the state courts and believe that legislation urged by certain social reformers would meet with

[24] Russell v. Croy, 164 Mo. 69; and State *ex rel.* Johnson v. C. B. & Q. R. R. Co., 195 Mo. 228.

more favorable treatment in the supreme court of the United States than in the state courts.

More Liberal Construction by United States Supreme Court of Scope of Police Power

Without considering the merits of these several cases, this much is clear, that the supreme court of the United States has tended far more to a broad and liberal construction of the constitutional guaranties in cases involving the exercise of the police power than have some of the state courts; and with comparatively rare exceptions such state statutes have been sustained as not violative of the federal constitution.

In a notable case,[25] wherein the supreme court sustained the validity of a statute of the state of Utah, limiting employment in underground mines to eight hours a day, it impressively reviewed important legal reforms effected by statute during the nineteenth century,

[25] Holden v. Hardy, 169 U. S. 366.

such as changing the ancient tenures of real estate, the emancipation of married women, and the like, and emphasized the progressive character of the law, and added:

The Supreme Court on Progressive Character of Constitutional Law

"They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

"Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that, from the day Magna

Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees, as they arise."

The United States Supreme Court and State Courts Contrasted as to Annulling Legislation

Reference has already been made to the contrast between the comparative brevity of the federal constitution, stating in broad, comprehensive terms the great outlines of the powers of government, and the detailed restrictions upon legislative power contained in the later state constitutions. Thus the supreme court of the United States, during the one hundred and twenty years of its existence, has declared void only some twenty-five acts of congress, while in several of our

states the number of legislative acts declared void by the state courts has been many times that number. Thus, in the state of Missouri, which is fairly illustrative of the modern restrictive constitutions, since the adoption of this constitution, the supreme court of the state has declared void some one hundred and thirty legislative acts or municipal ordinances, and this including only eighteen biennial legislative sessions. On the other hand, the supreme court of the United States in the one hundred and twenty years of its existence, in the exercise of what may be called its distinctively federal jurisdiction as well as in its enlarged jurisdiction under the fourteenth amendment since 1868, has annulled some two hundred and twenty state laws. But this number is small when compared with the volume of cases which are crowded upon the court, particularly in late years, in which the validity of state legislation is attacked. The greater number of these cases are those in which the

supreme court has exercised distinctively federal jurisdiction; that is, declared void state acts which interfere with interstate commerce, or impair the obligation of contracts. The cases in which it has annulled legislation on the ground of the want of due process of law, or the equal protection of the laws, have been very few indeed; though, as before stated, the cases in which such relief has been sought are very great in number.

It is clear, therefore, that this exercise of the judicial power has been far more frequent in the states than in the federal courts. While this is no doubt in great part due to the contrast already noted between the federal and the later state constitutions, it is also true that the federal judges, particularly in the supreme court, have been more conservative and cautious in the exercise of this power than have some, at least, of the judges of the state courts.

The Power over Legislation Strictly a Judicial Power

As already observed, it is a unanimously recognized doctrine that the power of the judiciary in determining the validity of legislation is strictly a judicial power. The court cannot consider the wisdom or policy of legislation, nor will it consider political as distinguished from strictly judicial questions. The power, says Professor Thayer, must be so exercised by the court as not to deprive any department of any of its proper power, or to limit it in the proper range of its discretion.[26] A power so momentous as it is, must be exercised, as the courts have always recognized, with caution, and in the language of Justice Marshall, the courts must never forget that it is the constitution they are expounding.

An act of the legislature, therefore, is not to be declared void unless the violation of the

[26] Essays on Constitutional Law, p. 9.

constitution is so manifest as to leave no room for reasonable doubt.

It is an anomaly, therefore, and in the popular mind difficult to reconcile with this principle that legislative acts are not to be declared void in any case of reasonable doubt, that judges, nevertheless, declare acts void, when the dissent in their own number, often pronounced in very vigorous terms, shows that the question was not free from doubt in the minds of the individual judges. This maxim seems to be construed in such cases by the majority, that is, by the judges concurring in the opinion declaring legislation void, as meaning that their own individual minds should be free from doubt.

The public seem to find it difficult to appreciate this distinction and we have proposals both in the legislatures of the states, and in the congress of the United States to limit the power of the judiciary by requiring an unanimous court or a definite number of

the judges to concur in declaring a statute void. The people of Ohio have recently adopted a constitutional amendment requiring that at least five of the six judges of the supreme court must concur in declaring an act of the legislation void as violative of the constitution.

Practical Operation of Judicial Power Illustrated by Income Tax Amendment

We have had an impressive illustration in this country of the practical operation of this judicial power with reference to the admittedly doubtful construction of the grant of the taxing power of congress. It was held by the supreme court in 1895, in the Income Tax cases,[27] by a divided court, that a tax upon incomes was a direct tax, required by the constitution to be apportioned among the states. This opinion was rendered in a suit brought by an interested party, and was uni-

[27] 157 U. S. 429.

versally acquiesced in as annulling the act of congress though there was a wide difference in professional opinion as to the court's ruling. Mr. Lowell has wisely said that our constitutions obstruct the *whim,* but not the *will* of the people. The sixteenth amendment to the constitution has been recently ratified by the necessary number of the states expressly to meet the difficulty caused by this decision, so that now the power which the popular will desired may be lawfully exercised.

The fact that two amendments to the federal constitution have been ratified by the states within the past year clearly shows that, when the people are satisfied that change is demanded, there is no difficulty in making the popular will effective.

III

Page	*Foot Note*	*Citations*
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105	4	33 Conn. 586.
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112	8	Juilliard v. Greenman and Legal Tender Cases, 110 U. S. 421.
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129	16	Carroll on the Fourteenth Amendment and the States, p. 106.
131	17	Carroll on Fourteenth Amendment and the States, ch. VII.
133	18	McCullough v. Maryland, 4 Wheaton 316.

Page	*Foot Note*	*Citations*
134	19	*In re* Debs, 158 U. S. 564.
136	20	Henry Hitchcock on American State Constitutions, 1887.
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145	25	Holden v. Hardy, 169 U. S. 366.
150	26	Thayer's Essays on Constitutional Law, p. 9.
152	27	157 U. S. 429.

CONTENTS

IV

IV

The Recall of Decisions and of Judges

In the last lecture we considered the historic development of the judicial power in the United States, the establishment and enforcement in both the federal and state Courts of the judicial power, when duly invoked in litigation with respect to legislation, the expansion of the federal judicial power over state legislation by the fourteenth amendment, and the results of excessive restraints upon state legislation under the state constitution.

Progressive Democratization of State Courts

An important fact in the judicial history of the country is the progressive democratization of the courts; that is, of the state courts. The federal judges are appointed, as they have been from the beginning—the constitution providing that the judges of the

supreme and inferior courts shall hold their offices during good behavior. This was adopted from England. At the time of the adoption of the constitution in 1789 none of the states chose their judges by popular election, and in most of them their tenure was for life, or on good behavior. During the Jacksonian era in the last century, in the thirties, the so-called democratic movement spread over the country, substituting popular election for appointment, until now, outside of the six New England states, there are but five states in which the judges of the supreme court are selected otherwise than by popular election, that is, by either appointment or election by the legislature. One of these excepted states, Mississippi, it is interesting to know, was the first one to adopt the elective system, which, in its constitution adopted after the reconstruction period, it abandoned and adopted the appointive features; that is, appointment by the governor with confirmation by the state

senate. The terms of office vary from a life tenure in Massachusetts, New Hampshire and Rhode Island, and from periods ranging from twenty-one years in Pennsylvania to two years in Vermont. The usual terms seem to be six years in cases of judges of the supreme court and four years for judges of the trial courts, and two years for justices of the peace.[1]

This democratization of the courts extended far beyond the substitution of an elective for an appointive judiciary. It was distinctly based upon the distrust of the judicial power. Although the ancient forms of pleading have been abolished in nearly all the states, the legislation of the states, as a rule, undertakes to provide the details of judicial procedure, and in many the trial judges are compelled to give their instructions to the jury in writing, and are forbidden to comment upon the testimony. In some of the states, the appellate judges are forbidden, even by the constitutions, to exercise

[1] Stimson's Federal and State Constitutions, sec. 654.

any discretion as to what opinions should be given in writing, and therefore must give them all in writing, whether important or unimportant, whether valuable as precedents or not, and are compelled to set out in their opinions a full statement of the facts and the reasons for their conclusions.

Mr. Bryce on our Elective Judiciary

Mr. Bryce, in his recent revision of his commentaries upon our institutions, says that the American bench has suffered from the all-prevalent system of popular election and from the scanty remuneration afforded. In the states which have adopted the so-called system of primary elections for nominations, candidates for the bench are compelled to enter the lists as contestants for nomination and then for election.

Danger of the Elective System

It can hardly be a matter of surprise that the bench should suffer from such conditions.

It is not my purpose to discuss the merits and demerits of the elective and appointive systems. This much is clear, however, that the selection of judges in a country of written constitutions, where the courage and independence of the judiciary are essential to provide the public security, requires the supreme exercise of intelligence and self-restraint on the part of the people. It is true that the judges selected by popular vote for the highest and other state courts in the states of the United States have often ranked high in ability and character, and in many cases compare well with those selected by the appointive system in the federal courts. These facts bear eloquent testimony to the high and discriminating intelligence of the American people in the performance of this supreme duty of citizenship in the selection of their judiciary.

It is also true, however, that this forcing of our judges to seek political nominations is

in itself a danger which requires the development of a watchful public opinion and the earnest efforts of the bar.

Attention has been called in a preceding lecture to the tremendous power of public opinion in England in the control of the administration of justice, as shown in the anomalous arrangement whereunder the appellate jurisdiction of the House of Lords is administered by a selected number of trained judges. Such a development of public opinion seems extraordinary to us, though we have an impressive example of the force of changed public opinion in the election of our President and Vice-President by the electoral college, whose members were expected to exercise an important discretionary duty, but for nearly a century have been mere automatons in expressing the partisan choice. We have had, however, instances in this country where public opinion has been effective in selecting and continuing highly qualified judges in popular elections.

Thus, in one state to which my attention has been called, I am informed that political nominations for the bench are unknown. But such instances, I am forced to believe, are exceptional; and, despite the efforts of many members of the bar, judges are forced to seek partisan nominations at political primaries or party conventions, and to take their chances in the partisan contests at the polls. Those of us who have seen such contests can testify that eminent service counts for little when the election of judges is determined by the political conditions controlling the election.

The substitution in many of our states of nominations by primary elections in place of representative conventions, under the delusion that the power of those who give their time to politics can be eliminated by multiplying elections, has had the effect of accentuating the evil of our elective judiciary. Thus, the candidate is subjected to the annoyance and expense of two campaigns: first, for the

primary nomination, and then for the election. These deplorable conditions, it is gratifying to note, are arousing public attention; and no doubt public opinion favors taking judicial elections out of partisan politics, and out of the control of politicians. In attempting to secure this most desirable result, however, it should be remembered that a bi-partisan division of offices is very different from true non-partisanship in qualification for judicial office, though it may be an improvement on partisan nominations and elections.

It is obvious that election under these conditions directly impairs the independence which is essential to the office of a judge. These conditions also have a bearing upon the questions of reforms in judicial procedure; but this must be considered later.

As this is a time of general unrest, in which all human institutions are subjected to criticism, the judiciary can not expect to escape. Not only is the administration of justice com-

plained of, as to the procedure and delays of the courts—and that subject must be reserved for another lecture—but there is a further attack upon the judicial power itself, in so far as it delays or obstructs the popular will in its demand for social reforms.

The Purpose of Constitutional Restraints

It must be conceded that the effect of our rigid written constitutions is to obstruct, that is delay, all reforms through legislation. Their purpose in the final analysis was to secure the sober second thought of all the people and to insure that reforms should be enacted with caution and deliberation. These constitutional restraints were also intended to protect the minority, even the unpopular minority, against the majority, or at least to secure that no rights should be invaded, even for the public good, except in conformity to the constitutional limitations established for the general and permanent welfare of all the people.

These restraints, in the words of Burke, upon men, are to be deemed their rights.

It is true that in a sovereign parliament like that of England, legislation may be enacted without reference to any restraint of a written constitution, or to any review by the judicial power. That was the very condition that the founders of our government sought to avoid. It is also true that at the present time in England, thoughtful men are considering the great defect of their form of government, in the absence of any restraint upon the legislative power.[2] Mr. Maine terms the rule of our constitution, denying to the states the power to make any laws impairing the obligation of contracts, "the bulwark of American individualism against democratic impatience and socialistic fantasy."

President Hadley on the Judicial Power

This fundamental purpose of the American

[2] Popular Government, ch. 4.

constitutional system in insuring the sober second thought of the people has been well stated by President Hadley of this University:

"Legislature and executive are means given to allow the people to do what they please under certain constitutional forms. The judiciary is a means given to prevent the people from doing what they please. How can we explain the fact that these judicial restrictions are of the very essence of freedom? I answer, because the law of the United States as defined and administered by its courts, represents not only restraint, but self-restraint; and the kind of self-restraint which the nation must be prepared to exercise if it hopes permanently to enjoy the advantages of political freedom."

De Tocqueville on Restraints of Constitution

That thoughtful French philosopher, De Tocqueville, said that without its restraints the constitution would be a dead letter.

While there is a complaint of the judicial power over legislation, and we hear a demand for either the English system of a sovereign

parliament or that of the continent with its administrative law and weak judiciary, we find little or no complaint of what may be termed the substantive law between man and man which is administered by our courts.

The Progressive Development of Private Law

We have impressive illustrations of the developing power of our jurisprudence to meet the new and complex conditions of a progressing civilization. The development of our law has gone on apace, not only with legislation, but with the notable additions made to the substantive law by our courts as cases come before them. Thus, the power to regulate commerce, granted to the federal government in the time of the stage coach and sailing vessel, has been applied through successive developments and application of steam and electricity to the control of the vast details of commercial intercourse of the present day.

The fundamental principles of the law of contract have been applied to the modern intercourse by the telegraph and telephone. The common law of the innkeeper is applied to our great modern caravansaries, the law of the road to the motorcycle and the automobile, and the law of trespass to modern air ships.

Modern Impatience of Constitutional Restraints

But notwithstanding all this, we hear on every side complaints that the progress of the law is not commensurate with the wants of modern society. We are told that the judges are controlled by precedents of past ages and that our laws are construed without regard to the modern conditions. This complaint is especially voiced with reference to so-called social legislation. We find there is an impatience of constitutional restraints. We are not now dealing with the complaints of the delays and imperfections of our legal pro-

cedure, for that will be reserved for future consideration. There is an impatience manifested over the restraint imposed by our constitutional system, which was carefully devised to insure the sober second thought of the people and to restrain impulsive and inconsiderate action of any kind. We therefore have specific objections that our courts are not discharging their duty in relation to men and social and industrial justice when they decide cases involving the constitutionality of so-called social legislation, and therefore radical remedies are invoked, such as the recall of judicial decisions and the recall of judges, which deserve careful consideration because of the prominence of some of their advocates and their far-reaching character.

The Recall of Decisions

The more recent current discussion, particularly in relation to the proposed recall of judicial decisions, has centered about the recent

decision of the New York Court of Appeals, in the case already referred to,[3] wherein the so-called Workmen's Compensation Law of that State was held violative of the due process of law of both the State and Federal Constitutions. This decision was final, both as to the State and Federal Constitutions, as it was in favor and not against the Federal right claimed in the case. This statute, which was adjudged void, attempted to make an employer liable to pay compensation in certain fixed amounts to the employee or to his surviving dependents in case of his injury or death from accident, without reference to negligence; and in addition to this, at the election of the employee, the employer's common law liability for negligence was enforced. The effect of the statute was to make the employer, when negligent, liable in such damages as a jury might assess, and then to superadd the liability for fixed compensation

[3] Ives v. Railroad Co., 201 N. Y. 271.

in cases where he was in no way at fault. The effect, therefore, in the judgment of the court, was to place the burden upon the employer without any compensatory benefit. The court carefully distinguished the cases of common carriers where the public safety was involved, but held that the act applicable to all employers was violative of the due process of law guaranteed in both the state and federal constitutions.

It was as a result of this decision that the proposed recall of judicial decisions was advocated. This is to be distinguished from the recall of judges, which will be considered later, as this scheme deals, not with the individual judge, but with the law as declared by the court. Under this scheme, it is not every decision which is to be recalled by popular vote, but only special classes of decisions, and the decision itself remains in force as to the individual litigants. The scheme as outlined by its distinguished author, an ex-President

of the United States, is this: whenever the highest court of a state shall have declared unconstitutional a statute of the state passed under the police power of the state, for the supposed benefit or health or welfare or safety of a portion of the community, and whenever such statute has been held by the highest court of the state to be unconstitutional because interfering with the life, liberty or property clause of the constitution of the state, the people of the state shall have the right by majority vote to set aside the decision of the court declaring the statute to be void, and to restore the authority of the statute by this vote. As outlined by the ex-President, this did not extend to decisions of the supreme court of the United States, but is only directed against decisions of the highest court of a State.

Inadequacy of Recall of State Decisions

An obvious difficulty with this remedy thus

limited is that a judgment of the State court that a legislative act was violative of due process of law would declare that it was void both under the state and the federal constitutions, and under existing law this decision would be final as to both. The vote of the state electors specifically declaring that such a statute was valid, that is, not violative of due process of law, could have no effect upon this violation of the federal guaranty. It seems that the advocates of this measure have realized this, as during the present session of congress an amendment to the constitution is proposed whereunder decisions of the supreme court are to be subject to a national recall, and this proposition has been endorsed by some of the advocates of this recall of judicial decisions.

It has been argued that this remedy, by direct popular determination that a particular act is within the police power, is a more conservative method than the amendment to

the constitution to accomplish that result.[4] Thus it is said that such a popular vote would only authorize specific legislation, and therefore would be more conservative than a constitutional amendment couched in general terms. It is also claimed that constitutional amendments can not be drawn empowering the courts adequately to deal with cases of social injustice, which will not also be so comprehensive as to include cases to which they were not intended to apply.

Fundamental Objection to Recall of Decisions

This difficulty, however, affords no reason for adopting the remedy, which, as President Taft said, would result in the suspension or application of constitutional guaranties according to the popular whim, and would destroy all forms of consistency in constitu-

[4] Ransom on Majority Rule and the Judiciary, p. 40.

tional interpretation. It would be a return to the judicial determination by the popular assembly familiar in classic history. It would substitute the vote of the populace for the determination and judgment of the court, and would be in effect destructive of judicial power. It is true the people make the constitution and have the power to amend it, but this does not mean that they should have the power to disregard its application, or that we should substitute the popular judgment upon specific acts of legislation in place of relying upon the general guaranties of private right in the constitution.[5]

The proposed recall of judicial decisions is in principle more objectionable than the recall of the judge, as in the latter case the people would only vote upon the fitness of the individual judge, while in the recall of decisions

[5] For full discussion of the subject of the recall of judicial decisions, see address of Henry W. Taft at the New York Bar Association, January, 1913.

the exercise by the people of the essentially judicial function is involved. This novel suggestion of the recall of judicial decisions doubtless springs from the impatience over the delay in securing reforms growing out of the decisions of the courts that such enactments are violative of Federal and State constitutional guarantees of property rights. Such a remedy misconceives the fundamental theory of our political system with its distribution of the powers of government.

The Recall of Judges

A more serious attack upon the courts is that of the judicial recall, as this has been adopted in the constitutions of several of the states, that is, in the States of Oregon, California, Colorado and Arizona. In the latter state, President Taft vetoed the statehood bill because of the inclusion of this judicial recall clause, and it was thereupon omitted.[6]

[6] Veto Message of August 15, 1911.

After the state's admission to the Union, it was, of course, sovereign with respect to its own constitution, and it thereupon readopted the same clause. This judicial recall does not seem to have been aimed in the first instance at the judges, but it has been adopted as a panacea applicable to all officials, and judicial offices have been included in it in the states named. The effect of the recall is that a certain numbers of voters can demand that the officials shall submit to a re-election. The state of Oregon provides that after one attempt to recall, the officeholder shall not be submitted to another during his term of office, unless the second petitioner shall pay into the public treasury the entire amount of the expenses of the first attempt. California provides that the state shall reimburse the officeholder, whose removal is unsuccessfully sought, his entire expenses. This subject of the recall of judges, as well as that of the recall of judicial decisions, was very exhaus-

tively discussed by the Hon. William B. Hornblower of New York in his address to the graduating class of this law school in June, 1912.[7] I concur in his condemnation of the scheme, not only in its effect upon the character of the judges and upon the rights of the individual litigant, but upon the principles of the law and the rights of the public, and with his statement that the tendency would be to substitute for the fearless and independent judge, a spineless, flabby, cowardly judge, a reed shaken by every wind.

The American Bar Association has firmly condemned this scheme.[8] It may be true that the public would be cautious and discriminating in the exercise of this power. But the fatal objection to it is, not that the people would necessarily be unwise in its exercise, but because its existence, whether exercised

[7] See Yale Law Journal, Vol. 22, No. 1.

[8] See Annual Report of American Bar Association of 1912.

or not, would be fatal to the independence of our judges.

The Existing Recall Through Short Elective Terms

In considering this subject of recall, however, we must not overlook the fact that, with our short terms, we now have another form of recall, which is almost as effective in destroying independence and efficiency of our judiciary. Mr. Arthur J. Eddy, in an address before the Chicago Bar Association,[9] says that under this the judge is recalled by law, and put off the bench at the very height of his usefulness, and subjected to the worry, uncertainty and expense of a re-election when nobody wants an election, and the election, nine times out of ten, will turn, not upon the record of the judge, but upon the political conditions of the hour. He recommends,

[9] West Publishing Co. Docket for November, 1912.

therefore, and with force, that if judges were elected for life, and thus secured against the existing form of recall, that then there might well be a recall, with proper limitations, on this question of his continuing fitness for the office.

In this connection it is interesting to note that bills have been introduced into the legislatures of several states providing for such a judicial recall; that is, for electing circuit and supreme court justices at special judicial elections on strictly non-partisan ballot, to hold office for life unless removed for cause by popular vote.

This modification of the principle of recall, by associating with it the election of judges for life, has been endorsed by ex-President Roosevelt in a recent address. It is certainly far preferable to our present system of electing judges for short terms and subjecting them to recall at each recurring election. Even as thus qualified, however, the recall as applied to judges is subject to the very grave objection

that it impairs the independence of the judges in compelling them to submit, even at stated intervals, their judicial record to popular judgment at the polls. Far better would it be to elect our judges for life, or for long terms, with the power of removal by address by the legislatures under provisions now existing in some of our state constitutions, and also in the English parliament. It certainly is to be hoped that the discussion of the recall will take into consideration the evils of the existing recall in our system of electing judges for short terms by popular election.

The Judiciary the Weakest of Governmental Powers

It was well stated by Mr. Hamilton that the judiciary is the weakest of the powers of government, and it is a mistake to suppose that the independence of the judiciary supposes superiority of the judiciary over the legislative

power. It only supposes that the power of the people is superior to both, and where the will of the legislature declared in its statutes stands in opposition to that of the people declared in their constitution, the judges ought to be governed by the latter rather than the former.

The power of the people through the legislative will over the judiciary was forcibly illustrated in the reconstruction period, when the supreme court of the United States was prevented by an act of congress from passing on the validity of the reconstruction acts, which had been enacted at the close of the civil war, in a case which was actually pending. A Mississippi editor, having been arrested by military order for publishing an article speaking of the policy of the government, was held for trial before a military commission. His application for *habeas corpus* having been denied by the circuit court, he appealed to the supreme court of the United States. That court held that it had

jurisdiction and heard the case on its merits. Congress, fearing that the court would decide that the reconstruction acts were unconstitutional, thereupon pass an act repealing the right of appeal in such cases from the circuit court. As Governor Baldwin says in his American Judiciary,[10] the purpose of this was obvious, but none the less effective; and the court, without deciding the case, dismissed it for want of jurisdiction.[11]

In this case the court said that it was given appellate jurisdiction by the constitution, but the constitution also provided that that jurisdiction, both as to law and facts, should be with such exceptions and under such regulations as congress shall make.

It is also true that the administration of justice, as well as the exercise of all the powers of government, is dependent upon the legislative support of these establishments through

[10] P. 117.

[11] *Ex Parte* McCardle, 7 Wallace, p. 506.

their annual appropriations. The power of the purse is really the power of sovereignty.

The essential weakness of the judiciary is further illustrated in the history of the supreme court of the United States. While the constitution establishes the supreme court, it leaves the number of its members to be fixed by congress. During the administration of President Andrew Johnson, when congress was at war with the President and did not wish him to make any appointments to the court, as it did not wish its reconstruction legislation construed by his appointees, it reduced the number of the bench, as vacancies occurred, from nine to seven, thus preventing him from making any appointments, and it did not increase the bench again to nine until he had retired from the presidency and General Grant had succeeded him. In the states, however, as a rule, the number of judges is fixed by their constitutions.

The Controlling Power of Public Opinion

In the last analysis, it is obvious that the exercise of judicial power in this country, whether in the federal or state courts, is dependent upon public opinion. In the words of Professor Burgess:[12]

"It is, then, the consciousness of the American people that each law must rest upon justice and reason, that the Constitution is the more ultimate formulation of the fundamental principles of justice and reason than mere legislative acts, and that the judiciary is a better interpreter of these fundamental principles than the legislature. It is this consciousness which has given such authority to the interpretation of the constitution by the supreme court."

He calls attention to the fact that when the supreme court declares an act unconstitutional, congress and the President immediately accept the decision as having annulled the act; whereas in England, France and

[12] Political Science and Constitutional Law, Vol. 2, p. 365.

Germany such an effect is scarcely thought of.

We may admit that our rigid written constitutions, both in State and Nation, may tend to make the operation of public opinion slower than in other countries, and may also tend sometimes to intensify professional conservatism and to make our lawyers strict constructionists so that at times they may seek to ignore the substance in searching for technical arguments and objections.

The remedy, however, does not lie in destroying or impairing the independence of the judges or in submitting to the hustings grave questions of constitutional construction concerning the legislative power over personal and property rights. There are remedies, however, which may provide effectually for the undue obstruction of the popular will in enacting desired legislation.

The Power of Amending Constitutions

While the power of amending the federal

constitution under our complex form of government is comparatively difficult, though recent experience proves that this difficulty is not insurmountable, this is of less importance in view of the comprehensive character of the federal constitution, so that it is only in grave national emergencies that amendments are called for. On the other hand, in nearly all the states the process of amending the state constitution is comparatively simple. Thus, in my own state of Missouri, at our recurring biennial election we have had in many years past from seven to fifteen separate amendments to the State constitution submitted to popular vote. The same vote which can review a judicial decision in the proposed recall of decisions, can prevent the possibility of such decisions in the future by repealing or amending the provision of the constitution on which the decision was based. This would be an orderly and effective method of enforcing the popular will.

The State Constitutions Should be Less Restrictive

In the second place, as has already been pointed out, a very fertile cause of the class of decisions of State courts annulling State laws as violative of State constitutions, is in the detailed and restricted character of the legislation contained in such constitutions, particularly in those most recently adopted. These are the states where the dockets of the courts are crowded with constitutional questions, which should not be raised in any country. The remedy lies in omitting such detailed legislation from constitutions, making them contain only provisions which are proper in the organic law, and at the same time making them readily amendable when the public need demands upon due and proper consideration.

The Legislative Product Should be Improved

Reference has been made to the close connection of our restricted state constitutions and

the immense and deteriorating volume of state legislation, and to the powerful influence of both these factors in increasing so-called constitutional litigation with its train of distrust, which does so much to destroy the confidence which should exist between the judiciary and the people. Whatever tends to improve the legislative product is, therefore, a direct assistance in remedying the unfortunate conditions which now exist. Attention has already been given to this matter in different states, and official draftsmen have been appointed in one or more states, such as exist in the British Parliament, where no bill is introduced which is not passed through the hands of such official. The result, we are told, is that the British statutes are models and free from the verbiage and obscurity which characterize so much of the law making of this country.

Still more important is the organization of *bureaus of legislative research,* whereby, under competent direction, legislatures may be in-

formed as to what other states have done in the way of legislative experiments, all obtainable information given, and bills are prepared for the members. The state of Wisconsin has set a fine example in the organization of such a bureau, and this example is being followed in other states and municipalities. Such a bureau should have a very salutary influence in improving the legislative product. Whatever accomplishes this, will doubtless be effective in relieving the conditions which now oppress our judicial system.

Reference has also been made to the suggestion, which has received the endorsement of the American Bar Association, that the statute of 1789 should be amended so that the Supreme Court of the United States may grant writs of error in cases where the federal claim has been denied in the State court. While this would relieve the anomaly, which has been mentioned, of having the state court finally pass upon the application of the Federal

guaranty of due process of law or the equal protection of the laws, the proposal is open to the objection that it would add to the present overcrowded docket of the Supreme Court of the United States, and would be open to the further objection that it would increase to a very great degree the existing power of the Federal court as compared with the State courts, reducing the latter to a distinctly subordinate position in the construction of the guaranties of the fundamental rights of the citizen.[13]

Complaints as to the Personality of Judges

The complaint against our judiciary, which is voiced in the demand for a recall of judges, rests upon different considerations from that involved in the proposed recall of judicial

[13] It has been proposed as essential to an effective "recall of judicial decisions" that the "due process of law" and "equal protection of the laws" clauses should be omitted from the state constitutions. Professor Dodd in Political Science Quarterly, March, 1913.

decisions. Human justice is necessarily administered by men, and we have found in all times that this agency is subject to the imperfections of our common humanity. Thus, judges, who are physically strong, may be prostrated by disease, and in the course of time all of them are subject, as other men, to the psalmist's limit of human activity. Thus, in many of the states there is a retiring age, usually of seventy years, and, as a rule, there is no system of pension for those who are thus compelled to retire on account of age or physical infirmity.[14] There is, however, in the laws of the United States a laudable pro-

[14] Mr. Hamilton, in the 79th Federalist, after referring to the age limit of retirement under the New York law, at that time sixty years, and discussing the general subject of age retiring limit of the judges, says: "There is no station, in relation to which it is less proper than to that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period in men who survive it; and when, in addition to this circumstance, we consider how few there are who outlive the season of intellectual vigor, and how improbable it is that any considerable portion of the bench, whether

vision whereunder judges who have served for ten years, and have reached the retiring age, may resign and receive their salary for life. In England, after fifteen years of service, or on being disabled by permanent infirmity, judges may retire on a pension. In all ages it has been recognized that a large human experience as well as soundness of intellect and learning are essential for the proper performance of a judicial office. For this reason the elders have been selected both in ancient and modern times. The more reason, therefore, for making suitable provision, so that the people can utilize this wide experience while

more or less numerous, should be in such a situation at the same time, we shall be ready to conclude that limitations of this sort have little to recommend them. In a republic where fortunes are not affluent, and pensions not expedient, the dismission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench."

at the same time making provision for the inevitable limit of human activity by pension for retiring judges. Mr. Hamilton's objection to the retiring of judges by address seems to have been based upon his belief that in this country pensions were not expedient. As we have seen, however, a system of retiring pensions has been adopted as to the federal judges, and in recent times the pensioning system has been extensively adopted in business enterprises for employees retired on account of age or disability.

Judges are also subject to the imperfections of our common humanity in other than physical relations. We have heard frequent complaints that judges carry into the judicial office the tendency to prejudge questions growing out of their educational environment and social and business dependencies. We had an impressive illustration in the Electoral Commission case in 1877, where in a grave national emergency for which the constitution had

made no express provision, judges of the Supreme Court decided the questions submitted by a strictly partisan vote, and the judges aligned themselves on the side of their respective partisan relations in the same manner as did the members of congress who were associated with them. It has been charged that certain so-called privileged interests have been exceptionally active in the selection of candidates for the elective bench, and sometimes even in securing the ear of the appointive power where judges are selected by appointment. Such cases, however, it is believed are exceptional, and are the unavoidable incidents of human institutions, which can only be remedied by the discriminating action of the electorate or the appointing power.

The Efficiency of the Remedy by Impeachment

There is a remedy, and an effective one, for the protection of the people against dereliction

of duty, and that is, in the power of impeachment, the ancient common law proceeding, whereunder the Commons of England exercised the right of procedure against anyone, whether in public office or not, and of trial before the House of Lords. It differed in the common law from the process by bills of attainder in that the accused was allowed a hearing, and proofs were required, though not necessarily with the restrictions of a court of justice. This remedy has become almost obsolete in England. It is preserved in full force and vigor in the constitution of the United States and in the constitutions of many of the states as a means of removing delinquent officials. We have had some impressive examples of the efficiency of this remedy.

It has been determined by the senate of the United States on an impeachment trial, though by a majority vote, and not by the two-thirds vote necessary for conviction, that resignation does not protect an official against subsequent

impeachment.[15] It has also been determined recently by the senate by an almost unanimous vote that a judge may be impeached not merely for indictable crimes, but for any act discrediting his office and prejudicial to the public and therein constituting a dereliction of his public duty. Under the constitution of the United States judgment in cases of impeachment extends no further than removal from office, and a disqualification to hold any office of honor or trust or profit under the United States; but the party convicted is nevertheless liable and subject to indictment and to trial and punishment according to law for any indictable offense. The power of impeachment is essentially a judicial power exercised by a legislative body.

Removal of Judges by Address

However effective the provisions for impeachment of judicial officers may be for cases of dereliction of duty, this remedy obviously

[15] Belknap case in 1875.

does not reach many cases of unfitness for the performance of the duty of the office which involved no dereliction of duty, such as permanent disability incapacitating the judge for the duties of the office. It is the absence of an efficient remedy for such cases that has been the mainspring of the demand for judicial recall in some sections of the country. It is true there ought to be a prompt and efficient remedy for any inability to perform judicial duty commensurate with the dignity and responsibility of the judicial office.

In England, in the Act of Settlement of 1701, wherein the judges who have been given the tenure of good behavior, that is, for life instead of being subject to removal at the pleasure of the King, it was at the same time provided that they should be removed by the King upon an address from both Houses of Parliament. This principle was incorporated in the Adjudicature Act of 1875,[16] wherein it

[16] Section 5.

is provided that all the judges of the High Court of Justice and of the Court of Appeal, with the exception of the Lord Chancellor, who, under the English system, goes in and out with his party, shall hold their offices as such judges respectively during good behavior, subject to a power of removal by the Crown on an address presented by Parliament.

In the federal constitution the tenure of good behavior for the judges, both of the supreme and inferior courts, was adopted; but the provision for removal other than by impeachment for dereliction of duty was not adopted. The want of a provision for removing the judges on account of inability was objected to, but it was claimed by Mr. Hamilton, in the 79th Federalist, that impeachment was the only provision which was consistent with the necessary independence of the judicial character.[17] A different view, however, was

[17] Constitution of Missouri, Art. VI, Sec. 41, and Sections 3893 and 3894 Rev. Stat. 1909.

taken in some of the states, and the example of England was followed in providing for the removal of judicial officers by address. Thus, in the state of Missouri,[18] the constitution provides for the removal of judges by address whenever the judge is unable to discharge the duties of his office efficiently by reason of continued sickness or physical or mental infirmity. Two-thirds of the members of each House concurring, with the approval of the Governor,

[18] Mr. Hamilton says in this connection: "The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practised upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification."

the judge is removed from his office, but each House must state on its journal the cause for removal; and he has a right to be heard in his defense under a procedure provided by statute. The arbitrary or partisan exercise of the power is thus sought to be prevented. Under the English system the address was originally a petition to the Crown, but under the modern theory of the sovereignty of Parliament the address is essentially an exercise of the legislative power of parliament. In England it has not been found necessary to exercise the power for the reason that the judges who are disabled by permanent infirmity may retire on a pension. In this country the system has apparently fallen into disuse, probably through the existence of the effective power of recall through short judicial terms existing in most of the states and the necessity for securing popular vote for re-election. For reasons already shown it is clear that this remedy of short terms is hopelessly inadequate and in-

consistent with any proper conception of the judicial character.

The Rightful and Effective Remedies

The public interest demanding the prompt administration of justice, clearly requires that there should be an effective remedy, not only against dereliction of duty on the part of judges, but against unfitness for office of any kind, even physical infirmity; and protection from interruption and delay in the administration of justice is not inconsistent with judicial independence, but is demanded by the vast importance and responsibility of the judicial office.

The true remedy is to abandon our system of short terms in the state courts and to provide for the appointment or election of judges, as under the English system, during good behavior. The question of appointment or election, in my judgment, is not as important as this extension of the judicial term. With

this, however, we should revive the ancient remedy of making the judges' removal by address of the legislative body after due hearing; and public opinion and the bar should enforce the use of this remedy whenever there is any unfitness for the due performance of the grave duties of the judicial office. By unfitness is meant a demonstrated, permanent incapacity to perform the duties of the office. With this we should provide for a suitable pension when the judge is removed from office for any cause not involving moral dereliction. Thus we could develop a power of public opinion which would, no doubt, in time have the effect in this country, as it has in England, of obviating the necessity of calling the power into exercise.[19]

There are encouraging signs of the develop-

[19] This public necessity was illustrated by a recent act of congress authorizing the retirement of a judge of the supreme court who had served but a short time and was not qualified to retire under the statute, but who was permanently disabled from the performance of his judicial duty.

ment of a public opinion in favor of longer judicial terms, and even of a life tenure, and of the removal of judicial elections, where there are popular elections, from the influence of party politics. Such steps are in the right direction. The greatest political reform will be the removal of the influence of party politics from the selection of judges, whether in their appointment or in their election. With this should go an effective and an available procedure for the removal of any judge, whatever his tenure of office, whenever he is unable to discharge the duties of his office with efficiency, whether from misconduct or physical infirmity. Such should be the direction of public policy, and the fact that such a method is available should be a conclusive argument against the adoption of any expedient which would impair the independence of the judges and the integrity of our constitutional system.

Page	*Foot Note*	*Citations*
161	1	Stimson's Federal and State Constitutions, sec. 654.
168	2	Maine on Popular Government, ch. 4.
173	3	Ives v. Railroad Co., 201 N. Y. 207.
177	4	Ransom on Majority Rule and the Judiciary, p. 40.
178	5	Address of Henry W. Taft at the New York Bar Association, January, 1913.
179	6	Veto Message of President Taft, August 15, 1911.
181	7	Yale Law Journal, Vol. 22, No. 1.
	8	Annual Report of American Bar Association of 1912.
182	9	West Publishing Co. Docket for November, 1912.
186	10	Baldwin on Am. Judiciary, p. 117.
	11	*Ex Parte* McCardle, 7 Wallace, p. 506.
188	12	Professor Burgess, Political Science and Constitutional Law, Vol. 2, p. 365.
194	13	Professor Dodd, Political Science Quarterly, March, 1913.
195	14	Hamilton, 79th Federalist.
200	15	Belknap case in 1875.
201	16	Adjudicature Act 1875, sec. 5.
202	17	Constitution of Missouri, Art. VI, Sec. 41, and Sections 3893 and 3894 Rev. Stat. 1909.
203	18	Hamilton, 79th Federalist.

CONTENTS

V

V

Judicial Procedure

We have thus far considered the development of the judicial power under the complex system of the United States, whereunder the judiciary not only administers justice between man and man, but also under our system of constitutional law determines the validity of legislative as well as of executive acts in the enforcement of the controlling will of the people declared in our written constitutions. We have found that the people have ample protection against misconduct in the judicial office through the power of impeachment, and against unfitness of any kind in that office through removal by address, provided in some of our state constitutions modeled after that power contained in the laws of England. We now come to the criticism of the administration of the law by our judiciary, in its rela-

tion to the adequacy of our judicial procedure in the practical administration of justice. This criticism, we must concede, is well founded.

The popular as well as the professional arraignment of our system of judicial procedure is too well known to need recital. It is no exaggeration to say that the judicial procedure of the United States is now on trial before the bar of the public opinion of the country and even of the civilized world. This public arraignment of our judicial procedure has appeared not only in the popular press, but in our American and State Bar Associations, and it has been voiced by one of our foremost citizens, the late President of the United States, himself an experienced jurist, now an honored member of this faculty, who has declared that the most conspicuous failure of our American civilization is in the administration of justice, both civil and criminal. It has been declared in our national political plat-

forms and has received the most emphatic recognition in the recent revision of the Rules of Equity Practice adopted by the Supreme Court of the United States.

The American Bar Association on Procedure

Some twenty-five years ago a special committee appointed by the American Bar Association found that the average length of a civil law suit in the United States was from a year and a half to six years; and the Committee reported that, if it were possible to put into ten words the chief causes for the delay and uncertainty in our judicial administration, they would say:

"Complex procedure, inadequate judiciary, procrastination, retrials, unreasonable appeals and uncertain law."

Although a quarter of a century has passed since this report was made, it is no exaggeration to say that in many states of the country the administration of justice is still the subject

of criticism, the law's delays are still the subject of investigation in our Bar Associations, and the inadequacy of our judicial procedure is the subject of all but universal complaint.

Contrast with Foreign Countries

The delays and the often resulting denial of justice in our judicial procedure have been impressively contrasted with the promptness and efficiency of the judicial systems of Great Britain, Canada and the continental countries of Europe. Especially notable is this contrast with the systems of Great Britain, from which we have inherited our common law, and our rules of evidence and the essentials of our judicial procedure. Professor Lawson of Missouri, now the editor of the American Law Review, who was especially delegated to investigate the judicial administration of Great Britain, tells us that the English Digest for twenty years has not contained the title, "Appellate Procedure," and for the reason that

there is no appellate procedure in the American sense of the term. Written opinions, which with us are a matter of course in nearly all our appellate courts, and sometimes in trial courts, are there far less common; that is to say, the judges usually announce their opinions orally and they are taken down and written out by the reporters.

Artificial Rules of Evidence

This contrast in our procedure with that of Great Britain and other countries is not only in what may be called the appellate, but also in the trial procedure. No feature of the English courts has impressed American lawyers who have attended trials there as much as the comparative absence in the English courts of discussions of evidence in the admission or exclusion of testimony. All thoughtful lawyers recognize that our system of evidence, especially in its exclusionary rules, is essentially artificial and the outgrowth of our

jury system, and not adapted to the practical administration of justice in a busy commercial age. This was forcibly stated in a recent address by Governor Baldwin of this State before the Missouri Bar Association, wherein he says that the English judges made these rules of evidence, for the most part, a century ago, and made them because they, the judges, had to deal with juries composed of men of illiterate and untrained minds, incapable of making nice distinctions and discriminations as to the weight of evidence.

Mr. Wigmore, in his introduction to his exhaustive work upon evidence, says that the rigid construction given in the American courts to these exclusionary rules and the frequency of reversals on account of erroneous rulings growing out of protracted trials, are largely owing to the contentious theory of our jurisprudence that makes every appellate hearing a quest for error rather than a search for justice. He finds a remedy in the broader

and more liberal training of our lawyers, while Governor Baldwin points out that the only solvent of the difficulty is to give more and more range to the sound discretion of the trial judge, and this, he says, is the most redemptive factor of our law of evidence and will be the distinguishing part that our judges must play in adapting our jurisprudence to the wants of a commercial age.

Presumption of Prejudice from Error

Time will not permit me to discuss the details of procedure in the different states nor a reference to all the specific remedies suggested. There can be no question that a very frequent cause of reversals and new trials and delays is the doctrine of the presumption of prejudice from error. That is, the appellate court presumes from any erroneous ruling in the course of a trial that the defeated party and appellant has been prejudiced thereby and the judgment against him must be reversed.

The American Bar Association has petitioned congress for an amendment to the federal judiciary act, so that no judgment should be set aside or reversed or a new trial granted for error in any matter of evidence or pleading or procedure unless it should appear that the error complained of had injuriously affected the substantial rights of the parties. It is true that there has been a difference of judicial opinion as to the weight of this presumption of prejudice from error, and this recommendation of the American Bar Association has not yet been acted upon by congress.

The really effective cure, however, for the miscarriages of justice which sometimes undoubtedly result from the application of this principle of prejudice from error, must be found in the development of public and judicial opinion, as without this any statutory enactment must be unavailing. This is illustrated by the fact that state statutes similar

to that proposed by the Bar Association have not prevented some of the state appellate courts from holding that fatal prejudice is necessarily presumed from error in the course of the trial, and that this presumption must be rebutted by facts affirmatively shown by the record.

The correction of the application of this principle, however, has a direct relation to the elevation of the character and independence of the judiciary. It requires a broader intellectual comprehension to determine the essential justice of a cause than to render a decision upon a hard and fast rule of evidence or other procedure. Judges sometimes decide cases upon technical questions because they are spared the trouble of investigating the merits, and sometimes, I have heard, because they believe the merits of the case call for such a decision, but that by deciding upon a technicality, they are spared the trouble of writing an elaborate opinion upon the merits.

The Modern Reform of English Procedure

This contrast of American procedure with that of England is interesting when we recall that the reform of the English procedure is comparatively modern. It is not many years since the delays of English Chancery were satirized by Dickens in the case of Jarndyce v. Jarndyce. The trial by battle, though long obsolete, was not formally abolished in England until 1819, and it is only in comparatively recent times that the relation of procedure to the substantive law has been clearly and distinctly understood in England. We have followed the example of England in abolishing in many states the ancient common law forms of procedure and in adopting the so-called reform code of procedure, but we are just beginning to recognize, as has long been recognized in England, that any statutory code of procedure which undertakes to regulate all the details of practice is liable itself to become the subject of technical construction and lead to

the miscarriage of justice. Thus, some of the most technical decisions which have startled the country in recent years have been rendered in states which have for some years had the so-called reform procedure on their statute books. One may naturally ask for the reasons why reform in judicial procedure has been so effectively established in England, while it is so notoriously laggard in this country, though both have inherited and administered the same system of substantive law.

We cannot overlook the fact that there is in England a vastly greater prestige attending the office of judge than in this country, due no doubt, in great measure, to the peculiar deference paid there, and in a lesser degree in the English colonies, to official station. It is also true that in that country the trained professional opinion of the bar carried greater weight in directing public opinion essential to legislative action, and such action by a sovereign parliament is far more direct than

that secured to the complex governmental machinery of this country.

Furthermore, in England, judges are relieved from the necessity of deciding the constitutional questions which are involved in our political system of rigid written constitutions, both state and federal, and the judges thereby escape the criticism which we considered in the last lecture, aroused by the exercise of this duty among those who are impatient of all restraint upon the speedy accomplishment through legislation of desired social reforms.

Consequences of Distrust of Judicial Power in United States

When we turn from this situation in England to that in this country, we find that the deplorable inadequacy of our judicial system which is so sharply contrasted with that of other countries has been developed, at least in the State courts in the United States, during

a period of legislative activity directed against the common law independence of the judges, and resulting in effectively limiting their common law powers. It has been a period of progressive democratization of the courts, which apparently in some states is not yet ended. In a great majority of the states, judges of the state courts, both of the trial and supreme courts, are nominated and elected by the people. Mr. Bryce, in the recent revision of his commentaries upon our institutions, says that the American Bench has suffered from the all-prevalent system of popular election and the scanty remuneration allotted. Since he wrote this revision, five of the states have adopted the principle of direct judicial recall, so that the judges who make unpopular decisions, that is, decisions disapproved by the then majority of the voters, can be summarily removed from office by popular vote. In nearly all the States, the judges are subject to a recall hardly less effec-

tive in the short judicial terms, which require them to submit to the judgment of the voters at frequent intervals and to take their chances with public nominations and the changing political control of the polls. This legislation based on a distrust of the judicial power has extended beyond the shortening of the judicial terms. Although the ancient forms of pleading have been generally abolished, the statutes of most of the states undertake to provide the details of judicial procedure, and in many the trial judges are compelled to give their instructions to the jury in writing and are forbidden to comment upon the testimony. In some of the states the appellate judges are forbidden to exercise any discretion as to what opinions should be given in writing, and therefore must give them all in writing, whether important or unimportant, and are compelled to set out in their opinions a full statement of the facts and the reasons for their conclusion.

This is the judicial procedure which has proven inadequate for the demands of a busy commercial age and has become the dread of our business men and the sport of our satirists. It has resulted in congestion in the appellate courts of many of the states, causing delay, and, in effect, denial of justice. An instructive and impressive conclusion which we must draw from these considerations is that the only effective remedy for this deplorable situation is the vesting of a larger discretion in the judges, so that they may have the power and the independence to disregard technicalities, to regulate the rules of procedure, and inaugurate a reform of the anomalies of our archaic rules of evidence. We must, therefore, retrace our steps, and vest not less, but more, independence in our judges.

Those who seek to impair the independence that they still have by holding above them the threat of summary dismissal by popular petition, or by reviewing their opinions at the

hustings, will only aggravate our existing defects in the administration of justice. We can not remedy the existing situation until we enlarge and dignify the office of judge. This consideration is emphasized by the contrast with the procedure in the English courts, to which attention has already been called. It is true we can not in this country give our judges the deference and prestige which are due to inherited social conditions, but we *can* secure a judicial independence, even in an elective judiciary, which will rest upon a more enduring basis than that of England—upon the conviction of an enlightened self-governing people, that the prompt, efficient administration of justice can not be secured except through the wide judicial discretion of an independent judiciary. We can not in this country secure judicial reforms through the enactments of a sovereign parliament, applicable throughout the country, but the complex machinery of our government delays only the whim, and not

the will, of the people. The true philosophy of our governmental system is that it only secures that sober second thought of all the people which is essential to all enduring reform in human progress.

New Rules of Equity Practice in United States Courts

These considerations are forcibly illustrated by the recent Rules of Practice in the Courts of equity of the United States, promulgated by the supreme court of the United States November 4, 1912, and which took effect on February 1 of this year. Judge John F. Dillon in his lectures in this course in 1894,[1] remarks that in no other system of jurisprudence do we witness the combating and conflicting rules which mark our division of rights and remedies into legal and equitable. He says that the separation of what we term equity from law was originally accidental, or

[1] Laws and Jurisprudence of England and America, p. 386.

at any rate was unnecessary, and rests upon no principle, and he predicts that the existing diversity of rights and remedies must disappear and be replaced by a uniform system of rights as well as remedies.

No one can read these new revised rules of practice, comparing them with those which had existed, in substance, since the foundation of the government, without realizing that the supreme court is convinced of the necessity of radically reforming our procedure to meet the wants of a commercial age, and also that the courts are the only competent authority to make these detailed rules of procedure.

Public attention has been called to so much of these rules as regulate the matter of the issuance of temporary injunctions, but this requirement, in rule 73, really lays down no new principle, in that restraining orders must not be granted without notice, without proof of immediate and irreparable loss or damage, which the courts do not already enforce.

There are other provisions, however, such as the doing away with the separate return day, the abolition of demurrers, pleas and replies, and simplifying the pleadings; and more important than all, the provisions that testimony must usually be taken in open court, and that testimony by deposition must be the exception, and not the rule, are of far-reaching importance. Other important provisions are in rules 22 and 23, which recall the view of Judge Dillon above quoted, that if at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the Court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential; and if in any suit in equity, matter ordinarily determinable at law arises, such matter shall be determined in that suit, according to the principles applicable, without sending the case or question to the law side of the court.

Thus, in rule 25 it is provided that a bill of complaint shall contain a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence. And the same requirement is made in rule 30 as to the answer of the defendant.

Time will not permit a detailed statement of these rules, but it is sufficient to call attention to the very important provision made in rule 75, for the preparing of the cases for appeal, whereunder the duty is imposed upon the solicitors of condensing, so that it may be presented in simple and succinct form to the appellate court. And under rule 76 it is provided that special care must be taken to avoid the inclusion in the transcript on appeal of more than one copy of any paper, and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein. And it is further provided that costs for the infraction of such

requirements may be imposed upon offending solicitors, as well as parties.

The promulgation of these rules by the supreme court of the United States, practically revolutionizing the time-honored procedure in courts of equity, must necessarily have a profound and far-reaching influence in the different states. It is a signal illustration of the importance of the preparation of rules of procedure by the judges who are to administer them. Surely the power which can make a judgment can prescribe how it is to be made. It is well said by Professor Wurtz[2] that altogether these rules indicate a most determined effort on the part of the highest court of the land to bring about a reform which the public has long been demanding.

The Fusion of Law and Equity Practice

The adoption of these rules by the supreme court is of vast importance, not only in sim-

[2] See Yale Law Journal, January, 1913, on the New Equity Rules of the United States, p. 141.

plifying the procedure in equity in the federal courts, but also in the tremendous stimulus it will give to the reform procedure throughout the United States. It also suggests the broader question, discussed by Judge Dillon, to which reference has been made, as to the essentially artificial and, as he terms, originally accidental distinction between law and equity in the courts of the United States. It is interesting to see how this problem, which does not exist in continental countries, has been sought to be solved in England. We find there the admission of equitable defenses in common law actions, and that an equity court is enabled to obtain the verdict of a jury upon disputed facts without the old and cumbersome method of remitting the whole case to the common law court for a trial upon a special issue.

In this connection we should observe that this great reform has been effected in England in the fusion of equity and common law

practice, so far as in the nature of things it can be effected, by the rules of practice which are established, and can be changed by the Lord Chancellor with the approval of the majority of the judges. These changes must be submitted to Parliament, and they become void if that house passes a resolution of veto within forty days. I quote from a recent observer of the English practice:

"The consequences of this very sensible arrangement are that the vast improvements in practice which have so greatly facilitated and accelerated English litigation have been effected by the courts and bar of their own initiative without the necessity of a reliance upon the action of a legislative body largely incapable of dealing with such technical and important questions."

This emphasizes the fundamental principle which lies at the basis of any hope of reform, and we must enlarge judicial discretion and dignify the office of judge before we can hope for any permanent reform.

If time permitted, I should call attention to the movements for reform of procedure in the different states.[3] I am safe in saying that in many of the legislatures now in session, reforms based upon these fundamental principles are being urged.

The limits of this lecture will not permit a reference to these different enactments, nor to the specific remedies suggested. A very comprehensive recommendation has been approved by the American Bar Association that the whole judicial power of a state, at least for civil causes, should be vested in one great court, of which all the trial tribunals should be branches or divisions, that being in effect the English system, which has eliminated the technical questions of procedure which embarrass and delay our courts. This plan contemplates such an organization of the judicial system as will prevent needless waste of time,

[3] See New Jersey Practice Act of 1912, Yale Law Journal, January, 1913, by Edward Q. Keasley.

much duplication of records, and the like, thus obviating expense to the litigant and cost to the public. Some states have already taken steps in this direction, as in abolishing the requirement of a motion for new trial as an essential for appeal, and the needless formalities in preserving exceptions to adverse ruling, and the distinction between matters of record and matter of exception, with which many of our appellate courts are filled and which are unknown in England and in Canada, and, indeed, in any other civilized country.

A most important and effective step in the reform of judicial procedure would be an act of congress authorizing the supreme court to adopt rules for uniformity in pleading and procedure in law cases in the federal courts and do away with the attempted conformity with state practices in common law actions. The effect would doubtless be far-reaching in promoting uniformity in the states with the federal procedure.

The Requirements of Written Opinions

There is another very important branch of this matter of procedure, which relates particularly to the published reports of our appellate courts, which is becoming a burden almost too great to be borne. It seems that we shall be compelled either to diminish the number of appeals by limiting the right of appeal, or we must reform our present system of requiring written opinions in all appealed cases, however unimportant as precedents. The organization of intermediate courts, as we have found by experience in my state, has only aggravated the difficulty, as the opinions of these courts are required to be written and published.

I am not considering now the possible effect of the multiplied accumulation of case law upon the doctrine of judicial precedent, which is such a distinguishing feature of our English and American jurisprudence, as that is too large a subject for present discussion; but I do call attention to the growing practical neces-

sity for controlling and limiting the publication of the multiplication of all written judicial opinions. As Professor Lawson has pointed out, the written opinion is an American innovation in the law. At English common law, the judgments were always oral, except in very special cases, where there was a *curia vult advisari,* and the English reports were made by lawyers who sat in court and took down the judgments in their notes from the lips of the judges. What need is there for an appellate judge to include in his opinion copious citations from text-books and opinions from different parts of the country upon plain propositions of law?

Lord Coke says,[4] "If judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary service of the commonwealth, and their records should grow to be like *elephantini libri, of infinite*

[4] Coke's Reports, Part 3, Pref. p. 3.

length, and, in mine opinion, lose some of their present authority and reverence; and this is worthy for learned and grave men to imitate."

These remarks of Lord Coke were quoted by Justice Field, then chief justice of the supreme court of California and afterwards justice of the supreme court of the United States, in an opinion holding invalid a statute of California requiring the supreme court judges to give the reasons of its decisions in writing. He said the practice of written opinions was of modern origin, and that the legislature could no more require the court to give the reasons for its judgments, than the court could require the legislature to give the reasons for its enactments.[5]

This view has not prevented some of our states, as already pointed out, from specifically providing, both by constitutions and by stat-

[5] Houston v. Williams, 13 Calif. 24. This ruling has been followed in De Votie v. McGerr, 14 Colo. 577; and in Arkansas, Vaughan v. Hart, 49 Ark. 160.

utes, that appellate judges shall give their opinions in writing.

It may be said in passing that stenographers, though indispensable to the exigencies of modern life, have not been an unmixed good to the Bar and the public in the preparation of judicial opinions. I have heard learned judges say that such was their volume of business, that they had no time to condense their opinions, and that they were compelled to give to the profession—printed at the cost of the public—the results of their unrevised dictations.

The only effective remedy in this enormous multiplication of law books, which are searched for judicial precedents, is in the limiting of writing formal opinions to those cases which are deemed to be important as precedents. This determination must be made by some authority; and here again we find the necessity of vesting a larger discretion in our courts. No doubt these provisions requiring

written opinions were enacted from the distrust of the judges, and with the view of compelling evidence of the performance by their judges of their duty in the examination of the cases decided by them. But the time has come when this jealous distrust of the judges must give way to the necessity of a prompt and speedy administration of justice for the people. The great guiding principles of the law are now determined, though the infinite complexity of human transactions will continue to call for new applications of these controlling principles. It must be conceded that our printed volumes of reports are crowded with opinions that can be of no conceivable value in the decision of future controversies.

What I have said in relation to the requirement of written opinions in appellate courts is more applicable to our western states than to some of the eastern states. Thus, I understand that in the state of New York there is no requirement of writing opinions by the

judges of the appellate courts, and that the matter is left entirely to the discretion of each judge or the court of which he is a member. The result is that as a rule the affirmances in the New York court of appeals are without opinions, unless the cases are of public importance. The New York statute permits appeals from interlocutory motions to a far greater degree than is allowed in most of our states; and the enormous business of their courts could not be transacted if the writing of all opinions in the appellate courts was the rule as in our western states.

The Delay in the Decision of Causes

There are other causes of delay in the administration of justice in this country which have been the subject of popular as well as professional criticism—some of them have been incidentally alluded to—and I can not, within the limits of this discussion, presume to enumerate them in detail. Thus, the delay

in the decision of causes is a grave subject of complaint. This is largely owing, no doubt, to our insistence, in many states, upon written opinions in the appellate courts in all cases, whether important or unimportant. The practice of judges, particularly in appellate courts, of holding cases under advisement for months, even for years, has given just ground for both popular and professional criticism. The value of oral argument in such cases is necessarily lost. No feature of our American procedure is more adversely commented upon by jurists from England, continental countries, and even from Canada, than this. It would seem far better that judges of appellate courts should only hear such cases as they can promptly decide while the oral arguments are fresh in their minds, instead of devoting consecutive days to hearing a large number of cases argued which are to be written up weeks and months thereafter. Such a delay of justice easily becomes a denial of justice. Far

different is the practice of the English appellate courts. A few years since I heard, in the Court of Chancery, the argument of a new question in the law of Charitable Trusts made in the morning; and the same was decided by the judges in oral opinions immediately after the noon recess.[6] In the appellate courts of this country such a case would doubtless have involved a delay of weeks, and perhaps months, after the argument before an exhaustive written opinion with citations and quotations from analogous cases would be handed down.

The State of California attempted to remedy this evil by providing, in its state constitution, that judges should not draw their salaries until they had certified that they had no case under advisement for more than the prescribed number of days. I have understood that this was evaded by the judges causing

[6] See *In re* Nottage L. R. (1895) 2d Chancery, 649, holding that a legacy to a trust for the promotion of yachting was not a charitable trust.

the submission of all cases, which were not decided at the end of the term, to be set aside and the causes continued to the next term for argument. Similar attempts have been made, I understand, in other states. It seems that the true remedy is to simplify procedure, to relieve judges from the necessity of writing opinions in unimportant cases, and for the judges themselves to take no case under submission which cannot be determined within a reasonable time, which must be adjusted, of course, to the complexity of the case.

The Delays in Criminal Procedure

What has been said applies with even greater force to the procedure in criminal cases. It is true that such cases are usually advanced in the appellate courts, and it is also true that in England there has recently been allowed an appeal in criminal cases; but even with that, the delays in the enforcement of justice in criminal cases are far greater in this country

than in any other part of the civilized world. No doubt a very fertile cause of the delays and miscarriages of justice in criminal cases is the doctrine of the presumption of prejudice from error, to which reference has been made. What has been said of the necessity of enlarging the discretion of judges in relation to the rules of evidence and of the senseless formalities in regard to exceptions, applies with even greater force to criminal cases.

Historic reasons also existed in this country for the jealous guarding of the rights of the accused in prosecutions by the State. When our Constitution was framed the statutory criminal law in England was most drastic, and the judges found it necessary from considerations of humanity to strain every technicality. Thus, the rule of protection against self-incrimination, which is adopted in the fifth amendment of the federal constitution, and in nearly all of the state constitutions, has been cherished in this country as one of the

safeguards of personal liberty. However important this exemption was in past centuries, when the individual needed protection against the power of the state, a far different question has been presented in our modern civilization, when society needs protection against organized crime. This distinction was forcibly presented some years since by Governor Baldwin of your state, in an address to the American Bar Association.[7]

Self-Incrimination

To such an extent has this theory of the exemption from self-incrimination been carried in this country that in many of the states where accused parties are permitted to testify, courts are forbidden to comment to the jury upon such refusal, thus ignoring the obvious deduction which every reasoning man would draw from the refusal of an accused party to explain incriminating circumstances. Such an

[7] American Bar Association, rep. 1883.

exemption is unknown in continental countries, where they act upon the theory that a man who is innocent would desire to make full explanation. In this country our constitutional immunities have compelled the public authorities to resort to devious methods, such as the "third degree" examination of accused parties.

In a recent decision the Supreme Court of the United States[8] has held that this exemption from self-incrimination, though secured as against federal action by the fifth amendment to the United States constitution, is not one of the fundamental rights of national citizenship so as to be included among the privileges and immunities of the citizens of the United States, which the states are forbidden by the fourteenth amendment to abridge, and that this exemption is not safeguarded as against state action by the provision of the fourteenth amendment that no state shall deprive any person of life, liberty or property

[8] Twining v. New Jersey, 211 U. S. 78.

without due process of law. This was in a New Jersey case, and in that state the courts are allowed to call the attention of the jury to the refusal of an accused person to testify, although he is not compelled to testify. The court affirmed the conviction in such a case, holding that the exemption from compulsory self-incrimination had been developed as a rule of evidence by the English courts and was not included in the due process of law guaranteed by Magna Charta. This decision is of great importance as showing the change in public and judicial opinion in recognizing the dangers pointed out by Governor Baldwin, in that now society needs protection against crime as much as, or more than, the accused needs protection against the power of the State.

Technicality the Sign of Undeveloped System of Law

The situation in this country in our judicial procedure is the more intolerable, and indeed

indefensible, when we consider that it is now recognized by the students of historical jurisprudence that extreme technicality is a sign of an undeveloped system of law, in which legal rights are subordinate to the procedure to enforce them, wherein the substance is secondary to the form. Centuries ago, the main business of the courts was in ascertaining rules that litigants should follow, and this extreme technicality and formalism in the early days of society was a step, but only the first step, toward a rational system for determining controversies. It is better than private war. That is, the determination by chance and wager of battle was an advance upon that primitive state where men took the law into their own hands. We now recognize that the demand for simplicity in procedure does not spring from ignorant reformers and radical iconoclasts, but is a progressive step in the rational advance of a progressive jurisprudence. Forms were regarded with superstitious rever-

ence in the early stages of society, but we now recognize that the simpler the procedure the better it serves its purposes. It does not mean that accuracy and precision of statement in judicial procedure shall be any less important than they are now, or that a clear and concise statement of the facts in issue will not always be effective. Substance and not form, however, must be of the first importance. It does not mean that we shall substitute haste and want of consideration for deliberation and judgment; but it does mean that our judicial machinery must be so modeled that justice can be literally brought home to the people, and that busy men can afford to litigate the complicated questions arising in our complex industrial life.

Importance of Independence of Judiciary

The realization of this reform in our procedure, which is so essential to the due administration of justice, is not a Utopian dream.

Such a suggestion, in view of the experience of other countries, would be an imputation on the practical good sense of the American people, and indeed upon their capacity for self-government. It clearly appears that this reform is dependent at every stage upon the wide discretion of an enlightened and independent judiciary. Whether we substitute elastic court rules for a rigid statutory procedure—or appeal to the courts to apply their judicial discretion in liberalizing our archaic rules of evidence which now obscure the ascertainment of the facts in issue—or if we make the trial judge more than a mere umpire in the game of litigation, or if we seek to reduce the overwhelming mass of printed reports to those only useful as precedents, or even if we seek to reduce the intolerable length of judicial opinions—or if, more than all, we seek to remove the ancient presumption of prejudice from error, and to make our appellate hearings more than mere quests for

error—in each and every one of these methods of reform we find as an indispensable factor the enlarged discretion of an independent judiciary. This much is certain, if we continue in the mistaken policy, both past and present, of distrusting and limiting the judicial power and of preventing as far as may be the exercise of judicial discretion, our efforts for effective reform in judicial procedure will be doomed to failure.

We have thus seen that an independent judiciary vested with large judicial discretion fitted for the performance of judicial duty is as essential for any effective reform of our defective judicial procedure as it is for the enforcement of the primary law of the state set forth in our constitutions, both federal and state. Unless our judges are independent and protected against popular clamor and the demands of political changes, they can not perform their duty to the people. in the administration of justice for the people.

No worse calamity could befall our people than the adoption of a scheme which would impair this independence of the judiciary. On the other hand, as we have shown, this principle of judicial independence does not mean that the people should not be protected against misconduct on the one hand and proven incapacity on the other, but the remedies therefor should not impair the independence of the judiciary whereon rests the integrity of our constitutional system.

This independence of the judiciary, however, can not be secured without a supporting public opinion. The highest proof of the capacity of the people for self-government is their submission to the judgments of the courts. This supporting public opinion can not be insured without the co-operation of an intelligent, learned and conscientious bar. As lawyers, we have a profound duty in the guiding and directing of public opinion so as to secure and enlighten an independent judiciary.

This means that we must control our contentious spirit in the trial of causes and make the quest for error subordinate to the demands of justice. Lawyers have in the past been the leaders in the movements for popular reforms. Let us also be leaders in guiding and directing public opinion so that the administration of justice may be adequate for human wants and the integrity of our constitutional system may be preserved unimpaired for all time to come.

Page	*Foot Note*	*Citations*
227	1	Dillon, J., p. 386 of Published Lectures.
231	2	Yale Law Journal, January, 1913, on the New Equity Rules of the United States, p. 141.
234	3	New Jersey Practice Act of 1912, Yale Law Journal, January, 1913, by Edward Q. Keasley.
237	4	Coke's Reports, Part 3, Pref. p. 3.
238	5	Houston v. Williams, 13 Calif. 24; De Votie v. McGerr, 14 Colo. 577; Arkansas, Vaughan v. Hart, 49 Ark. 160.
243	6	*In re* Nottage L. R. (1895), 2d Chancery, 649.
246	7	S. E. Baldwin. Address before American Bar Association, 1883.
	8	Twining v. New Jersey, 211 U. S. 78.

INDEX

INDEX.